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IN THE

Supreme Court of the United States

October Term, 1987

FOREIGN CREDIT INSURANCE ASSOCIATION,

Petitioner,

v.

NU-AIR MANUFACTURING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the doctrines of official immunity and derivative sovereign immunity bar negligent misrepresentation suits against an association of private insurers serving as the Federal Government's agent under the congressionally mandated export credit insurance program.

2. Whether contract suits on insurance policies issued pursuant to the Federal Government's export credit insurance program are governed by a uniform body of federal law, or by the particularized laws of the 50 States and the District of Columbia.

PARTIES TO THE PROCEEDING AND RULE 28.1 LIST

In addition to the petitioner and respondent named in the caption, Frank B. Hall & Co. of New York d/b/a Intercredit Agency was a defendant in the district court and an appellee in the court of appeals.

Pursuant to Supreme Court Rule 28.1, petitioner Foreign Credit Insurance Association ("FCIA") has set forth in the appendix at 51a, a list of FCIA's members at the time respondent filed this suit. These entities were named defendants in the district court and appellees in the court of appeals. However, by virtue of an agreement between FCIA and the Export-Import Bank of the United States entered into prior to the initiation of this lawsuit, FCIA's members have no financial interest in the outcome of this case. Pursuant to Rule 19.6, petitioner has informed the Clerk of the Court of its belief that FCIA's individual members have no interest in the outcome of this petition and will not participate in this proceeding.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 28.1 LIST	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
A. Factual Background	5
B. Opinions Below	6
REASONS FOR GRANTING THE WRIT	8
A. This Court Should Review The Eleventh Circuit's Decision To Clarify The Immunity From Non-Constitutional Tort Liability Of Private Participants In Federal Government Insurance Programs	12
1. Two Courts of Appeals Have Recognized the Immunity of Private Participants in Federal Government Insurance Programs.	13
2. The Decision Below Conflicts With Appellate Decisions On Both Official Immunity and Derivative Sovereign Immunity	14
3. The Court Below Was Wrong in Determining That Eximbank Does Not Enjoy Sovereign Immunity from Negligent Misrepresentation Suits	16

PAGE

B. The Court Should Review The Eleventh Circuit's Decision To Settle Whether State Or Federal Law Applies To Insurance Contracts Issued Jointly By Public And Private Entities Pursuant To Federal Government Insurance Programs .. 17

1. The Decision Below Undermines Uniformity of Decision in the Export Credit Insurance Program 18

2. The Decision Below Requires Eximbank and FCIA to Guess at the Law Applicable to the Export Credit Insurance Program .. 18

3. The Decision Below Conflicts With the Decisions of This Court and of at Least Three U.S. Courts of Appeals 20

CONCLUSION 23

TABLE OF AUTHORITIES

	PAGE
Anderson v. *Occidental Life Insurance Co.*, 727 F.2d 855 (9th Cir. 1984) (per curiam)	4,14
Atlas Pallet, Inc. v. *Gallagher*, 725 F.2d 131 (1st Cir. 1984)	4,21
Augustine v. *McDonald*, 770 F.2d 1442 (9th Cir. 1985)	15
Barr v. *Matteo*, 360 U.S. 564 (1959)	12
Becker v. *Philco Corp.*, 372 F.2d 771 (4th Cir.), *cert. denied*, 389 U.S. 979 (1967)	14
Beverly v. *Macy*, 702 F.2d 931 (11th Cir. 1983)	21,22
Bor-Son Bldg. Corp. v. *Heller*, 572 F.2d 174 (8th Cir. 1978)	17
Bradley v. *Computer Sciences Corp.*, 643 F.2d 1029 (4th Cir.), *cert. denied*, 454 U.S. 940 (1981)	14
Brazil v. *Giuffrida*, 763 F.2d 1072 (9th Cir. 1985)	4,21
Bushman v. *Seiler*, 755 F.2d 653 (8th Cir. 1985)	4,13
Butz v. *Economou*, 438 U.S. 478 (1978)	12
Claus v. *Gyorkey*, 674 F.2d 427 (5th Cir. 1982)	15
Clearfield Trust Co. v. *United States*, 318 U.S. 363 (1943)	17,18
Commonwealth of Pennsylvania v. *National Ass'n of Flood Insurers*, 520 F.2d 11 (3d Cir. 1975)	19
Davis v. *Scherer*, 468 U.S. 183 (1984)	13
Edelman v. *Federal Housing Administration*, 382 F.2d 594 (2d Cir. 1967)	17
Federal Crop Insurance Corp. v. *Merrill*, 332 U.S. 380 (1947)	8,19
Fine Wear Mfg. Co. v. *Giuffrida*, 580 F. Supp. 472 (E.D.N.Y. 1984)	21
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982)	12,16
Holmes v. *Eddy*, 341 F.2d 477 (4th Cir.) (per curiam), *cert. denied*, 382 U.S. 892 (1965)	17
Lovell Mfg. v. *Export-Import Bank*, 777 F.2d 894 (3d Cir. 1985)	19

PAGE

Matranga v. *Travelers Insurance Co.*, 563 F.2d 677 (5th Cir. 1977) (per curiam) 14

Norton v. *McShane*, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965) 16

Oyler v. *National Guard Ass'n*, 743 F.2d 545 (7th Cir. 1984) 15

Peterson v. *Weinberger*, 508 F.2d 45 (5th Cir.), *cert. denied*, 423 U.S. 830 (1975) 14

Potter v. *Giuffrida*, 635 F. Supp. 99 (S.D. Ohio 1986) . 21

Ricci v. *Key Bancshares of Maine, Inc.*, 768 F.2d 456 (1st Cir. 1985) 16

Schell v. *National Flood Insurers Ass'n*, 520 F. Supp. 150 (D. Colo. 1981) 21

United States v. *County of Allegheny*, 322 U.S. 174 (1944) 17

United States v. *Parish of St. Bernard*, 756 F.2d 1116 (5th Cir. 1985), *cert. denied*, 474 U.S. 1070 (1986) . 4,21

United States v. *Seckinger*, 397 U.S. 203 (1970) 17

West v. *Harris*, 573 F.2d 873 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979) 4,11,21

Westfall v. *Erwin*, 785 F.2d 1551 (11th Cir. 1986) (per curiam), *cert. granted*, 107 S.Ct. 1346 (1987) . 12

Williamson v. *United States*, 815 F.2d 368 (5th Cir. 1987) 15

Statutes

7 U.S.C. § 1507(c) 8

12 U.S.C. § 635 ..... *passim*

12 U.S.C. § 1749bbb-10a(b) 10

12 U.S.C. § 1749bbb-12 8

28 U.S.C. § 1254(1) 2

Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* 17

Federal Tort Claims Act, 28 U.S.C. § 2680(h) 7,17

42 U.S.C. §§ 1395h, 4001, 4051, 4081-82 8,10

43 U.S.C. § 1817(g)(2) 8

46 U.S.C. §§ 1287, 1289(d) 8

PAGE

Legislative Materials

H. Rep. No. 1476, 90th Cong., 2d Sess (1968) 11

H. Rep. No. 1126, 87th Cong., 1st Sess. (1961) 10

H. Rep. No. 92-303, 92d Cong., 1st Sess. (1971) 10

H. Rep. No. 95-235, 95th Cong., 1st Sess. (1977) .. 10

H. Rep. No. 320, 83d Cong., 1st Sess. (1953) 11

Miscellaneous

General Accounting Office, Export Credit Insurance: Assessment of Export Import Bank's Role, No. GAO/NSIAD-87-189 (September 1987) 9,10,11

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v.

NU-AIR MANUFACTURING COMPANY,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Foreign Credit Insurance Association ("FCIA") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-captioned proceeding on July 24, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 822 F.2d 987, and is reprinted in the appendix hereto at 1a.

The memorandum decision of the United States District Court for the Middle District of Florida (Kovachevich, J.) has not been reported. It is reprinted in the appendix hereto at 24a.

JURISDICTION

The court of appeals entered its judgment and order remanding this case to the district court on July 24, 1987. *See* 22a-23a. FCIA filed a timely petition for rehearing or rehearing by the court of appeals *en banc*. The court of appeals denied FCIA's petition on August 31, 1987. *See* 21a.

On November 10, 1987, Justice O'Connor ordered that the time for filing this petition for a writ of certiorari be extended to and including December 29, 1987.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

12 U.S.C. § 635 provides:

> (a)(1) There is created a corporation with the name Export-Import Bank of the United States, which shall be an agency of the United States of America. The objects and purposes of the bank shall be to aid in financing and to facilitate exports and imports and the exchange of commodities and services between the United States or any of its Territories or insular possessions and any foreign country or the agencies or nationals thereof. In connection with and in furtherance of its objects and purposes, the bank is authorized and empowered to . . . guarantee, insure, coinsure, and reinsure against political and credit risks of loss . . . .
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> * * *
>
> (b)(1)(A) It is the policy of the United States to foster expansion of exports of manufactured goods, agricultural products, and other goods and services, thereby contributing to the promotion and maintenance of high levels of employment and real income and to the increased development of the productive resources of the United States. To meet this objective in all its programs, the Export-Import Bank is directed, in the exercise of its functions, to provide guarantees, insurance, and extensions of credit at rates and on terms and other conditions which are fully competitive with the Government-supported rates and terms and other conditions available for the financing of exports of goods and services from the principal countries whose exporters compete with United States exporters . . . .
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> * * *
>
> (c)(2) The bank may issue such guarantees, insurance, coinsurance, and reinsurance to or with exporters, insurance companies, financial institutions, or others, or groups

thereof, and where appropriate may employ any of the same to act as its agent in the issuance and servicing of such guarantees, insurance, coinsurance, and reinsurance, and the adjustment of claims arising thereunder.

STATEMENT OF THE CASE

The Export-Import Bank of the United States ("Eximbank"), an agency of the United States government, directs our country's export credit insurance program. Pursuant to statutory authority, 12 U.S.C. § 635(c)(2), Eximbank in 1961 encouraged private insurers to form an unincorporated association, known as the FCIA,[1] to serve as Eximbank's agent in marketing, issuing and servicing export credit insurance policies. Eximbank has, since 1962, continuously appointed FCIA as its agent to market, issue and service export credit insurance policies designed and approved by Eximbank in order to fulfill the congressional mandate to expand U.S. exports. These policies protect U.S. exporters against the risk that foreign buyers of American goods or services will not pay due to either commercial or specified political reasons.[2] Under a single, unified insurance policy which contains one set of definitions, one set of exclusions, one set of agreements of the insured, and one set of other applicable terms and conditions, Eximbank is the insurer of the political risks of loss and FCIA's members are the named insurers of the commercial risks. Eximbank has always reinsured FCIA's members for losses arising out of commercial claims above certain agreed-upon levels. Since 1983, Eximbank has reinsured FCIA's members for all claims under the commercial risk coverage. *See* 12a.

Federal Government control of the export credit insurance program is complete: Eximbank exercises ultimate authority over the issuance of policies, the terms thereof, the premiums therefor,

1. FCIA is an unincorporated association of insurance companies.

2. The political risk provisions cover the foreign buyer's nonpayment as a result of such events as war, riot, nationalization of the buyer's business, or the buyer's inability to obtain dollars in a lawful market to satisfy a U.S. dollar obligation. The commercial risk provisions provide coverage against the buyer's default on its obligation to pay the policyholder for reasons other than those set forth in the political risk provisions.

and the acceptance or denial of political and significant commercial claims thereunder. The premiums set by Eximbank are subsidized by the Federal Government in accordance with the congressional directive that Eximbank provide insurance "at rates and on terms and other conditions which are fully competitive with the Government-supported rates and terms and other conditions available for the financing of exports of goods and services from the principal countries whose exporters compete with United States exporters." 12 U.S.C. § 635(b)(1)(A).

The Federal Government's export credit insurance program is part of the national commitment to increasing exports, 12 U.S.C. § 635(a)(1), and is an area of quintessential federal interest. In a period of skyrocketing trade deficits and international financial turmoil, the ability of U.S. companies to increase exports of U.S. goods and services abroad is all the more critical.

Notwithstanding these important national concerns, the Court of Appeals for the Eleventh Circuit struck two blows at the foundations of the Federal Government's export credit insurance program. In conflict with the decisions of other circuit courts of appeals regarding Federal Government insurance programs,[3] the Eleventh Circuit held that FCIA is not immune from suit for negligent misrepresentations committed in its role as the marketer and servicer of policies issued under the Federal Government's export credit insurance program. The court of appeals went on to attack Eximbank's status directly, concluding that Eximbank itself is not entitled to sovereign immunity from negligent misrepresentation suits despite the contrary directive of the Federal Tort Claims Act. The court of appeals compounded its divergence from the decisions of other courts of appeals[4] by further holding that state rather than federal law governs the rights

3. *Bushman* v. *Seiler*, 755 F.2d 653 (8th Cir. 1985); *Anderson* v. *Occidental Life Insurance Co.*, 727 F.2d 855 (9th Cir. 1984).

4. *Brazil* v. *Giuffrida*, 763 F.2d 1072 (9th Cir. 1985); *United States* v. *Parish of St. Bernard*, 756 F.2d 1116 (5th Cir. 1985), *cert. denied*, 474 U.S. 1070 (1986); *Atlas Pallet, Inc.* v. *Gallagher*, 725 F.2d 131 (1st Cir. 1984); *West* v. *Harris*, 573 F.2d 873 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979).

and duties of private participants in Federal Government insurance programs such as the export credit insurance program.

The decision below is a frontal assault on the Federal Government's export credit insurance program, and raises important questions of immunity from non-constitutional tort liability and of the applicability of state rather than federal law for all Federal Government insurance programs.

A. Factual Background

In early 1982, Nu-Air Manufacturing Company ("Nu-Air") applied to FCIA for an export credit insurance policy that would provide Nu-Air with political and commercial risk coverage for its export transactions. Concurrently, Nu-Air also applied for a special endorsement to the policy that would extend the policy's basic coverage to a large sale that Nu-Air contemplated making to a Nigerian buyer. Nu-Air understood that it needed the special endorsement, known as a Special Buyer Credit Limit ("SBCL"), to secure coverage under the policy for the large Nigerian transaction.[5] In March 1982, FCIA, in its capacity as Eximbank's agent, issued a quotation for the policy, which Nu-Air accepted. Subsequently, FCIA rejected Nu-Air's application for an SBCL endorsement because of a virtual economic collapse in Nigeria at that time.

Before FCIA rejected Nu-Air's SBCL application, Nu-Air's insurance broker apparently informed Nu-Air that Nu-Air could begin shipping to its Nigerian buyer. Nu-Air did so, and allegedly suffered a loss of $311,846.32 as a result of the Nigerian buyer's subsequent default. Nu-Air filed a claim with FCIA under the commercial risk coverage of its policy, which FCIA rejected on the ground that Nu-Air had no SBCL endorsement covering the Nigerian transaction.

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5. Basic coverage under export credit insurance policies typically permits insureds to make small sales up to a specified dollar amount per buyer (the "Discretionary Credit Limit"), subject to an aggregate for all buyers, without further review by Eximbank and FCIA. If the insured will have receivables in excess of the Discretionary Credit Limit, it needs to obtains an SBCL endorsement to insure the transaction.

Soon thereafter, Nu-Air filed its complaint in the district court. The complaint contains two counts against FCIA.[6] In the first count, Nu-Air alleges that a valid and binding insurance contract between FCIA and Nu-Air covered Nu-Air's loss in the Nigerian transaction. The second count alleges that FCIA negligently misrepresented to Nu-Air's broker, and through the broker to Nu-Air, that FCIA had approved the issuance of an SBCL covering Nu-Air's shipments to Nigeria.

Upon completion of discovery, FCIA, Nu-Air and Nu-Air's broker entered into a pre-trial order which included 143 stipulations of fact. Among other things, the parties stipulated that FCIA had acted as the agent of Eximbank within the scope of its authority, *see* 32a, and that Nu-Air had breached several of the terms and provisions of the policy, *see* 29a.[7] On the basis of these stipulated facts, FCIA moved the district court for summary judgment. Among the grounds urged by FCIA in support of its motion were: (1) as the agent of Eximbank, FCIA is immune from suits, such as Nu-Air's negligent misrepresentation claim, sounding in common-law tort; and (2) federal common law governs the rights and liabilities of parties to an insurance contract issued under a Federal Government insurance program, so that Nu-Air's failure to obtain and preserve coverage in accordance with the terms and provisions of its policy bars its recovery.

B. Opinions Below

The district court granted FCIA's motion for summary judgment. In pertinent part, the district court ruled:

> (G) FCIA was acting within its authority as the agent of the Export-Import Bank of the United States, and is

6. Nu-Air also sued its broker for breach of contract, negligence and negligent misrepresentation.

7. The only remaining disputed issue of fact in this case is whether FCIA advised Nu-Air's broker that FCIA had approved the SBCL endorsement or rather, as FCIA believes, whether Nu-Air's broker erroneously and unreasonably assumed FCIA had approved the SBCL endorsement when FCIA advised the broker it was issuing a policy quote.

immune from suit under Nu-Air's negligent misrepresentation claim.

See 49a. The court further held that Nu-Air's conceded violations of the policy terms barred its recovery.[8]

On appeal, the Eleventh Circuit reversed, rejecting application to FCIA of the doctrine of official immunity and the applicability of federal rather than state law to the Federal Government's export credit insurance program. With respect to official immunity, the court held that FCIA was subject to suit for its alleged negligent misrepresentations to Nu-Air, and specifically declined to follow other cases recognizing the immunity of private agents in Federal Government insurance programs. The court concluded that these cases recognizing immunity for private agents apply only to activity which furthers "paramount governmental objectives." *See* 14a. The court then held that immunizing FCIA from the tort alleged in Nu-Air's complaint would not serve any "worthwhile" purpose. *See id.*

In rejecting immunity for FCIA, the court further concluded that Eximbank itself, though an agency of the United States, would not be entitled to immunity from a negligent misrepresentation suit. Overlooking the immunity of federal agencies such as Eximbank from negligent misrepresentation suits as explicitly preserved in the Federal Tort Claims Act, 28 U.S.C. 2680(h), the court of appeals rested its conclusion on two grounds: (1) Eximbank's "entr[y] [into] the commercial sphere" by the issuance of insurance policies covering commercial ventures, and (2) the "sue and be sued" clause in Eximbank's enabling statute.

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8. The district court concluded:

> (F) Nu-Air's failure, until February 1983, to report to FCIA [the Nigerian buyer's] default ... bars Nu-Air from recovering against FCIA where Nu-Air was aware on or about August 31, 1982, that [the buyer] had defaulted on its obligation to make payment ....
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> * * *
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> (H) Nu-Air's failure to mail, prior to April 11, 1983, a Proof of Loss/Notice of Claim form, which FCIA received on April 18, 1983, bars Nu-Air's recovery here.

49a-50a.

Having determined that Eximbank would not be entitled to sovereign immunity from negligent misrepresentation suits, the court further found that FCIA was not entitled to derive immunity from Nu-Air's tort claim based on Eximbank's sovereign status.

Concerning the applicability of federal common law, the court of appeals rejected FCIA's reliance on both *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 (1947), and the decisions of federal courts of appeals recognizing the applicability of federal law to Federal Government insurance programs which include private participation. On the basis of its perception that this case involves "private contractual arrangements between private litigants," 12a, rather than the rights and duties of Eximbank's agent in connection with the marketing, issuance and servicing of an export credit insurance policy and the insuring of commercial risks under a single policy issued jointly on behalf of Eximbank and FCIA, the court of appeals applied state law to reverse the district court.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's decision adversely affects two important aspects of the Federal Government's export credit insurance program. First, by refusing to recognize FCIA's immunity, the decision below has impaired FCIA's status as Eximbank's agent, and has called into question the status of all private entities which play critical roles in a variety of Federal Government insurance programs as intermediaries for or agents of the Federal Government.[9] The decision below, if allowed to stand, would undermine the proper functioning of the export credit insurance program. If every misunderstanding between FCIA and prospective insureds,

9. Currently, in addition to Eximbank's export-credit insurance program, federal agencies possess the statutory authority or mandate to engage private insurers as partners, agents or intermediaries in connection with federal health insurance (42 U.S.C. § 1395h), flood insurance (42 U.S.C. §§ 4001, 4051, 4081-82), crime insurance (12 U.S.C. § 1749bbb-12), war risk insurance (46 U.S.C. §§ 1287, 1289(d)), crop insurance (7 U.S.C. § 1507(c)), and oil pollution insurance (43 U.S.C. § 1817(g)(2)).

policyholders and brokers could potentially develop into a negligent misrepresentation suit not subject to early termination through the immunity defense, the disincentives to effective marketing and servicing of policies would be overwhelming. Without immunity from common law tort suits, one of two undesirable outcomes would ensue. Either FCIA's marketing and servicing duties would be restructured to avoid all risks, private sector participation in the program envisaged by Congress would be increasingly less viable,[10] and exports ultimately would decrease, or in light of the below-market premium rates set by Eximbank, 12 U.S.C. § 635(b)(1)(A), Eximbank would be forced to increase premiums or provide greater subsidies. In the end, the effectiveness of the Federal Government's export credit insurance program in achieving the congressional mandate to promote U.S. exports would be undermined.

Second, the court of appeals' decision, in an abrupt departure from consistent federal appellate precedent, throws into confusion the question of which body of law governs the rights and duties of all participants in the export credit insurance program, as well as all other Federal Government insurance programs. Under the Eleventh Circuit's decision, Eximbank and FCIA are left in the impossible position of having to divine the body of law which might apply to claims filed years after liability-affecting decisions are made. The potential application of the laws of more than 50 jurisdictions to a government program would result in identically situated U.S. exporters receiving disparate treatment under a national program, would increase costs and premiums (ultimately reducing exports), and would undermine the viability of the congressionally mandated private sector role in this government program. In short, the Federal Government's export credit

10. Following large losses on claims arising out of the third world debt crisis in the early 1980's, private sector participation in the program was reduced to a historic low. Efforts to enhance private sector participation in this congressionally established program, *see* General Accounting Office, Export Credit Insurance: Assessment of Export Import Bank's Role, at 20-21, No. GAO/NSIAD-87-189) (September 1987) ("GAO Report"), would be frustrated in the absence of immunity from common law tort suits.

insurance program cannot operate effectively and fulfill the congressional mandate to increase U.S. exports where the governing legal framework is uncertain.

The Federal Government's export credit insurance program, in this time of international financial instability and trade tension, is vitally important to our country.[11] It has long been national policy for Eximbank, through its various programs including export credit insurance, to promote exports of U.S. goods and services.[12] Congress authorized the export credit insurance program, among other reasons, because of its concern that, in the absence of a government program, the private sector would not, as it theretofore had not, fill the national need for export credit insurance.[13] Congress authorized the participation of private insurers and expressed the hope that they would be extensively used in delivering export credit insurance, recognizing that, in

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11. Eximbank is a member of the International Union of Credit and Investment Insurers, a consortium of similar institutions from 32 countries which seeks cooperation on the terms on which governments offer export credit insurance so as to reduce predatory trade practices in this area. *See* GAO Report *supra* at 12-13.

12. 12 U.S.C. § 635(a)(1); H. Rep. No. 95-235, at 2-3, 95th Cong., 1st Sess., 1977 U.S. Code Cong. & Ad. News 3126-27; H. Rep. No. 92-303, 92d Cong., 1st Sess., 1971 U.S. Code Cong. & Ad. News 1417. In extending and amending the Eximbank legislation in 1977, Congress expressed concern with burgeoning trade deficits. In figures that seem quaint by comparison to today's levels, the House Committee which oversees Eximbank's insurance program fretted that the "U.S. trade balance was in deficit by $5.9 billion in 1976 .... Current estimates call for an overall trade deficit in 1977 of as much as $15 billion." H. Rep. No. 95-235, *supra*, at 3.

13. H. Rep. No. 1126, 87th Cong., 1st Sess., 1961 U.S. Code Cong. & Ad. News 3005-3007. Congress has authorized other federal insurance programs to fill a private sector vacuum. *See, e.g.*, 42 U.S.C. § 4001(b) ("The Congress also finds that (1) many factors have made it uneconomic for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions; but (2) a program of flood insurance with large scale participation of the Federal Government and carried out to the maximum extent practicable by the private insurance industry is feasible and can be initiated."); 12 U.S.C. § 1749bbb-10a(b) ("Upon determining . . . that . . . a critical market unavailability situation for crime insurance then exists in any State . . . the Director is authorized to make crime insurance available at affordable rates within such State through the facilities of the Federal Government.").

order for the Federal Government's export credit insurance program to be effective, it would have to rely on the private sector's experience and marketing talent.[14] Congress never suggested, however, that the participation of such parties meant that the export credit insurance program was not a program of national interest requiring the uniformity of interpretation and the consistency and predictability of outcome attendant to federal programs.

In a further reflection of the program's economic and political importance to the nation, Congress and Eximbank have retained strict control over the program. Congress has established the criteria (1) for setting the premiums to be charged, (2) the products and services to be insured, and (3) the countries to whom exporters may make insured shipments. *See* 12 U.S.C. § 635(b).[15] To ensure that the program promotes the policy choices made by Congress, Eximbank has always exercised ultimate authority over all decisions on the issuance of policies, the terms of coverage, and the evaluation of political claims and those commercial claims above a specified dollar amount. In addition, Eximbank has always borne substantial financial responsibility for the program.[16] Since October 1, 1983, under an agreement between Eximbank and FCIA, Eximbank has assumed even greater financial responsibility for the program. For commercial

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14. GAO Report, *supra* at 2; H. Rep. No. 1126, *supra* at 3007. Congress had previously authorized the participation of private insurers in an early Eximbank program providing war risk coverage as a cost-saving measure, because the expense of private participation "would be less than . . . if the bank itself were to assume entire operational responsibility for the program." H. Rep. No. 320, 83d Cong., 1st Sess., 1953 U.S. Code Cong.& Ad. News 1643, 1648.

15. *See* H. Rep. No. 1476, 90th Cong., 2d Sess., 1968 U.S. Code Cong. & Ad. News 2541, 2546. ("The intention of the legislation is to authorize the Bank to foster the foreign trade and long-term commercial interests of the United States by supporting transactions which may involve somewhat greater risks than those traditionally taken by the Bank under its basic charter.").

16. *Compare West* v. *Harris*, *supra*, 573 F.2d at 881, where the Fifth Circuit rested its decision to apply federal law to the flood insurance program in substantial measure on the fact that "the federal government participates extensively in the program both in a supervisory capacity and financially . . . ."

claims where FCIA is the nominal insurer, Eximbank is financially at risk because, under the agreement, it is obligated to indemnify FCIA in respect of claims paid.

The export credit insurance program is, therefore, a creature of Congress administered by Eximbank, and, like other Federal Government insurance programs, is designed to achieve important national objectives. However, the program's ability to achieve congressional policy is undermined when a previously uniform recognition of immunity from common law tort suits for private agents in Federal Government insurance programs is disturbed. Moreover, the program cannot function properly and achieve congressional goals unless Eximbank and FCIA are able to discern the legal standards applicable to them. This Court therefore should review the Eleventh Circuit's decision to resolve two crucial issues: (1) the immunity of FCIA from common-law tort liability,[17] and (2) the law, whether federal or state, applicable to the Federal Government's export credit insurance program.

A. This Court Should Review The Eleventh Circuit's Decision To Clarify The Immunity From Non-Constitutional Tort Liability Of Private Participants In Federal Government Insurance Programs

In a series of modern decisions beginning with *Barr* v. *Matteo*, 360 U.S. 564 (1959), this Court has reaffirmed the immunity of federal officials from suits sounding in non-constitutional tort arising from conduct within the scope of the official's authority. *See Harlow* v. *Fitzgerald*, 457 U.S. 800, 807-08 (1982); *Butz* v. *Economou*, 438 U.S. 478, 494 & n.21 (1978). The underpinning of the official immunity doctrine is "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Harlow* v. *Fitzgerald*, *supra*, 457 U.S. at 807, *quoting Butz* v. *Economou*, *supra*, 438 U.S. at 506. The Court

17. Now pending before this Court is a case involving the scope of the official immunity doctrine. *Westfall* v. *Erwin*, 785 F.2d 1551 (11th Cir. 1986) (per curiam), *cert. granted*, 107 S.Ct. 1346 (1987).

has also identified several "social costs" from lawsuits against government officials which justify the immunity: "These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." 457 U.S. at 814. Furthermore, the Court has recognized that "officials can act without fear of harrassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages. . . ." *Davis* v. *Scherer*, 468 U.S. 183, 195 (1984).

In accordance with these principles, each circuit that has reviewed the issue, except the Eleventh Circuit, has proscribed non-constitutional tort claims against private participants acting as the government's agent in connection with Federal Government insurance programs. The Eighth Circuit has held that the principles of official immunity established in *Barr*, *Butz* and *Harlow* prohibit such suits against private participants in federal insurance programs. The Ninth Circuit derives the private insurer's immunity from the immunity of its governmental principal; this court analyzed the tort claim under the doctrine of sovereign immunity. The Eleventh Circuit in its decision in this case stands alone in rejecting each line of authority.

1. Two Courts of Appeals Have Recognized the Immunity of Private Participants in Federal Government Insurance Programs.

The Eighth Circuit has drawn on official immunity principles to affirm the dismissal of a tort claim against the consultant to a private insurer which acted as an intermediary in the federal health insurance program. *Bushman* v. *Seiler*, 755 F.2d 653, 655-56 (8th Cir. 1985). Although noting that the defendant's "link to the government [was] indirect," 755 F.2d at 655, the court in *Bushman* concluded that the policies underlying the official immunity doctrine as enunciated in *Butz* compelled the

doctrine's application to federal insurance intermediaries. *Id.* at 656.[18]

The Ninth Circuit has adopted a different approach to uphold the private participant's immunity from common law tort liability. In *Anderson* v. *Occidental Life Insurance Co.*, 727 F.2d 855 (9th Cir. 1984) *(per curiam)*, the court held that the private participant's immunity is derived from the government's sovereign immunity.[19] The court reasoned that, in light of the agency relationship governing the private party's conduct, the United States is the real party in interest in lawsuits raising tort claims against the private insurer. "Accordingly, [under the sovereign immunity doctrine] the United States cannot be sued without its consent," and such claims are barred. *Anderson, supra*, 727 F.2d at 856.

2. The Decision Below Conflicts With Appellate Decisions On Both Official Immunity and Derivative Sovereign Immunity.

The Eleventh Circuit has now rejected the approaches of the Eighth Circuit (official immunity) and of the Ninth Circuit (derivative sovereign immunity). With respect to official immunity, the court below developed an analysis based on the nature of the activity engaged in by the government agent. Noting that some of the immunity decisions on which FCIA relied involved a defamation action by the subject of a government agent's investigative report, the court concluded that such government reports

18. The Fourth Circuit has not addressed the issue in the insurance arena, but it has drawn identical conclusions in the parallel context involving the liability of government contractors for actions taken pursuant to their delegated authority. *Bradley* v. *Computer Sciences Corp.*, 643 F.2d 1029 (4th Cir.), *cert. denied*, 454 U.S. 940 (1981); *Becker* v. *Philco Corp.*, 372 F.2d 771 (4th Cir.), *cert. denied*, 389 U.S. 979 (1967).

19. Several panels of the Fifth Circuit have analyzed the liability of private insurers under the rubric of sovereign immunity, although their reasoning suggests that they relied on the official immunity doctrine, *viz.* an insurer acting as the government's agent is immune from tort suits arising out of official conduct. *Matranga* v. *Travelers Insurance Co.*, 563 F.2d 677 (5th Cir. 1977) (per curiam); *Peterson* v. *Weinberger*, 508 F.2d 45 (5th Cir.), *cert. denied*, 423 U.S. 830 (1975).

are more *worthy* of protection than what the court disparagingly referred to as "misrepresentations [by FCIA] to its customers." 14a.

The Eleventh Circuit's comparison is fundamentally misleading. The court purported to compare government activity directed at uncovering fraud with alleged tortious activity by FCIA. An appropriate comparison would have been to compare government activity aimed at uncovering fraud with FCIA's government conferred mission as Eximbank's agent in the marketing, issuance and servicing of Eximbank/FCIA insurance coverage for an international commercial transaction, which coverage has been authorized by the Congress to help achieve national economic policy. *See* 11a, n.22. Depriving FCIA of immunity from negligent misrepresentation suits would, for the reasons discussed above, *supra* at 9, undermine that mission, impair the FCIA's national marketing efforts and run counter to express congressional policy favoring the private sector's involvement as Eximbank's agent.

In making the comparison that it did, the court of appeals concluded either that the uncovering of fraud is a more worthwhile governmental effort than the congressional policy of promoting U.S. exports or that defamation is more defensible than negligent misrepresentation. The court is ill-situated to make the former judgment in the teeth of express congressional policy favoring increased U.S. exports, and the latter distinction between types of common law torts is contradicted by prevailing case law. The courts of appeals uniformly have concluded that the immunity recognized in *Barr* is available in connection with all types of state law tort claims, from negligence actions to actions seeking damages for intentional torts.[20] In *Harlow* v.

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20. *See Williamson* v. *United States*, 815 F.2d 368 (5th Cir. 1987) (tortious interference with property, misrepresentation); *Augustine* v. *McDonald*, 770 F.2d 1442 (9th Cir. 1985) (abuse of process); *Ricci* v. *Key Bancshares of Maine, Inc.*, 768 F.2d 456 (1st Cir. 1985) (misrepresentation, negligence, defamation, intentional infliction of emotional distress); *Oyler* v. *National Guard Ass'n*, 743 F.2d 545 (7th Cir. 1984) (conspiracy to defraud); *Claus* v. *Gyorkey*, 674 F.2d 427 (5th Cir. 1982) (misrepresentation); *see also Norton* v.

Fitzgerald, supra, this Court described the official immunity doctrine as an "absolute immunity from *suits at common law*." 457 U.S. 807-08 (emphasis added). Clarification by this Court of the standard governing official immunity from tort liability for private participants in Federal Government insurance programs is necessary to eliminate the threat from the decision below to the effective functioning of the Federal Government's export credit insurance program.

The Eleventh Circuit's derivative sovereign immunity holding equally threatens the effectiveness of the export credit insurance program. The court of appeals disabled itself from following the Ninth Circuit's analysis in *Anderson, supra*, when the court below erroneously concluded that "in the present case ... Eximbank and the United States are not financially at risk." 15a. In fact, Eximbank was at risk on the policy issued to Nu-Air as it has been on every policy ever issued under the export credit insurance program. With respect to Nu-Air's claim, Eximbank would bear the financial impact of any judgment that Nu-Air might recover against FCIA by virtue of the October 1, 1983 agreement between Eximbank and FCIA.

3. The Court Below Was Wrong in Determining That Eximbank Does Not Enjoy Sovereign Immunity from Negligent Misrepresentation Suits.

The Eleventh Circuit's determination that FCIA is not immune from negligent misrepresentation suits also rested on the erroneous premise that FCIA's principal, Eximbank, an agency of the United States, is not entitled to sovereign immunity from negligent misrepresentation suits. This conclusion is also worthy of review by this Court. In deciding that Eximbank would not be entitled to sovereign immunity in the circumstances of this case,[21] the Eleventh Circuit relied on the "sue and be sued" clause in

McShane, 332 F.2d 855, 859-60 & n.5 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965).

21. In its complaint, Nu-Air also sued Eximbank. Early in the proceedings, Nu-Air dismissed its claims against Eximbank, and Eximbank has not directly participated in the litigation since that time.

Eximbank's enabling statute.[22] The court of appeals evidently overlooked the provision of the Federal Tort Claims Act which preserves the immunity of federal agencies such as Eximbank from negligent misrepresentation suits despite such "sue and be sued" clauses.[23] The court of appeals' startling conclusion in an area as sensitive as the government's entitlement to sovereign immunity deserves review by this Court.

B. This Court Should Review The Eleventh Circuit's Decision To Settle Whether State Or Federal Law Applies To Insurance Contracts Issued Jointly By Public And Private Entities Pursuant to Federal Government Insurance Programs

This Court has ruled in connection with the Federal Government's nationwide programs that federal common law should provide the rule of decision so as to avoid "the great diversity in results [that would arise from] making identical transactions subject to the vagaries of the laws of the several states." *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367 (1943). Specifically, this Court has held that "[t]he validity and construction of contracts through which the United States is exercising its constitutional functions, [and] their consequences on the rights and obligations of the parties, ... present questions of federal law not controlled by the law of any state." *United States* v. *County of Allegheny*, 322 U.S. 174, 183 (1944); *accord, United States* v. *Seckinger*, 397 U.S. 203, 209 (1970).

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22. 12 U.S.C. 635(a)(1) provides, as do the enabling statutes of many federal agencies, that Eximbank may "sue and be sued."

23. *See* 28 U.S.C. § 2679(a) ("The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency cognizable under [the Federal Tort Claims Act], and the remedies provided by [the Federal Tort Claims Act] in such cases shall be exclusive."). The courts of appeals have uniformly held that misrepresentation claims are "cognizable" under the Federal Tort Claims Act, but are barred by it under 28 U.S.C. § 2680(h). *See, e.g., Bor-Son Bldg. Corp.* v. *Heller*, 572 F.2d 174 (8th Cir. 1978); *Edelman* v. *Federal Housing Administration*, 382 F.2d 594 (2d Cir. 1967); *Holmes* v. *Eddy*, 341 F.2d 477 (4th Cir.) (per curiam), *cert. denied*, 382 U.S. 892 (1965).

1. The Decision Below Undermines Uniformity of Decision in the Export Credit Insurance Program.

The Eleventh Circuit's decision that state law rather than federal law applies in this case raises the very spectre anticipated by the *Clearfield Trust* line of cases. According to the Eleventh Circuit, the terms on which an insured acquires a policy issued under a Federal Government insurance program are governed by the vagaries of state insurance practice. Under the Eleventh Circuit's decision, the Federal Government's export credit insurance program, which reflects a national policy adopted by the Congress to promote U.S. exports, would be governed by over fifty sets of rules, procedures, statutes and regulations regarding the rights and obligations of insurers and insureds. Subjecting the program "to the vagaries of the laws of the several states," *Clearfield Trust, supra,* 318 U.S. at 367, would impose unanticipated costs and other burdens on the program, impede the congressional objective of promoting U.S. exports, and result in divergent treatment of similarly situated U.S. exporters under a national program. In legislating the use of private insurers in furtherance of the export credit insurance program, Congress never envisaged a program lacking in uniformity, certainty and predictability that application of state law would engender.

2. The Decision Below Requires Eximbank and FCIA to Guess at the Law Applicable to the Export Credit Insurance Program.

In deciding whether to apply federal or state law, the Eleventh Circuit artificially divided the export credit insurance program and the policies issued thereunder into supposed public and private components. It then held that state law governs FCIA's rights and obligations, while purportedly leaving "open the question of the extent to which federal law governs insurance contracts issued on behalf of Eximbank." 13a, n.24.[24] No court has

24. The court of appeals plainly failed to understand that the insurance policy issued to Nu-Air was in fact a single policy "issued on behalf of Eximbank." Indeed, every policy *ever* issued pursuant to the export credit insurance program has been a policy "issued on behalf of Eximbank."

ever drawn such a distinction for other Federal Government insurance programs,[25] and the distinction makes no sense in the export credit insurance arena.

If state law governs the rights and obligations of Eximbank, then under the court of appeals' decision, an entire federal program would be governed by state law. If, by contrast, federal law governs only Eximbank's rights and obligations, then the same definitions, conditions, exclusions and terms which are embodied in a single insurance policy and which apply equally to Eximbank and FCIA would be subject to different interpretations depending on whether events occurring years after a policy is issued give rise to a claim for political coverage (Eximbank's risk) or commercial coverage (FCIA's nominal risk).[26] Thus, whether a foreign buyer fails to pay the U.S. exporter because of an expropriation (political risk) rather than an insolvency (commercial risk) would dictate which body of law applies to actions taken years earlier, for example when a policy was issued, a premium accepted or some other liability-affecting step taken.[27] As a result, none of the parties to the policy—Eximbank, FCIA, and insured—would be able to discern whether fundamental policy

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25. In other federal insurance programs, private participants have also borne an underwriting risk. *See, e.g., Commonwealth of Pennsylvania* v. *National Ass'n of Flood Insurers*, 520 F.2d 11, 16-17 (3d Cir. 1975).

26. In *Lovell Mfg.* v. *Export-Import Bank*, 777 F.2d 894 (3d Cir. 1985), cited by the Eleventh Circuit, the court held only that government estoppel standards did not prevent assertion of a claim against FCIA for commercial risk coverage, and that ordinary estoppel standards would apply. The court did not decide whether those ordinary estoppel standards would be drawn from federal law or state law. Nonetheless, the decision in *Lovell* suffers from one of the same infirmities afflicting the Eleventh Circuit's opinion: decision-making by Eximbank and FCIA must be made in a legal vacuum.

27. The instant case presents an example of the absurd position the Federal Government faces as a result of this bifurcated approach. The Eleventh Circuit held that FCIA's acceptance of Nu-Air's premium estopped FCIA under Florida law from denying the claim. In the event Nu-Air had presented a political, rather than commercial claim, then under *Federal Crop Insurance Corp., supra*, an estoppel claim could not lie. At the time the premium was accepted, however, neither Eximbank nor FCIA knew whether any claim which might in the future be presented would be under the policy's commercial coverage or its political coverage.

provisions governing, for example, the filing of shipment reports, overdue account forms and claims will be interpreted in accordance with a uniform body of federal law, or rather will be subject to diverse state law.

In either situation—the application of state law to an entire federal program, or the unpredictable and capricious application of federal law in some instances and state law in others—the outcome is untenable, and the untenable outcomes are driven by the Eleventh Circuit's conclusion that FCIA's rights and obligations under the nation's export credit insurance program are subject to state law. It is inconceivable that Congress intended the Federal Government's export credit insurance program to be subject, either entirely or in substantial part, to divergent and inconsistent interpretation. Indeed, there is not a shred of evidence in the legislative history surrounding this program that Congress was doing anything less than defining paramount federal interests and the mechanism by which those interests would be advanced. Accordingly, review by this Court is essential at this time to determine whether federal law or state law applies to the Federal Government's export credit insurance program. Absent a decision by this Court, public and private participants in both the export credit insurance program and other Federal Government insurance programs will be deprived of the opportunity to conform their conduct to a body of law that is discernible at the time actions must be taken, commitments fixed or other decisions made.

3. The Decision Below Conflicts With the Decisions of This Court and of at Least Three U.S. Courts of Appeals.

The Eleventh Circuit's decision draws into question the continued validity of the uniform body of federal appellate precedent holding that, for the reasons expressed in *Clearfield Trust*, federal law must control in determining the rights and liabilities of the parties to insurance policies issued pursuant to Federal Government insurance programs. To date, except for the Eleventh Circuit, all courts of appeals which have considered the issue,

including courts in the First, Fifth and Ninth Circuits, have concluded that federal common law governs the rights and liabilities of the parties to an insurance contract issued under a Federal Government insurance program, notwithstanding the active participation of private insurers. *See Brazil* v. *Giuffrida*, 763 F.2d 1072, 1075 (9th Cir. 1985); *United States* v. *Parish of St. Bernard*, 756 F.2d 1116, 1121 (5th Cir. 1985), *cert. denied*, 474 U.S. 1070 (1986); *Atlas Pallet, Inc.* v. *Gallagher*, 725 F.2d 131, 138 (1st Cir. 1984); *Beverly* v. *Macy*, 702 F.2d 931, 935-36 (11th Cir. 1983); *West* v. *Harris* , 573 F.2d 873, 880-82 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979).[28]

In *West* v. *Harris*, for example, a case involving the federal flood insurance program, the National Flood Insurers Association, an organization whose role was identical in all material respects to FCIA's, was a named defendant.[29] The court of appeals held that the Federal Government's interests in the program mandated the application of uniform principles of federal law:

> Since the flood insurance program is a child of Congress, conceived to achieve policies which are national in scope, and since the federal government participates extensively in the program both in a supervisory capacity and financially, it is clear that the interest in uniformity of decision present in this case mandates the application of federal law.

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28. The idiosyncratic nature of the Eleventh Circuit's decision is further highlighted by the multitude of district court decisions consistently holding that uniform federal law must govern Federal Government insurance programs. *E.g.*, *Potter* v. *Giuffrida*, 635 F. Supp. 99 (S.D. Ohio 1986) (crime insurance); *Fine Wear Mfg. Co. v. Giuffrida*, 580 F. Supp. 472 (E.D.N.Y. 1984) (crime insurance); *Schell* v. *National Flood Insurers Ass'n*, 520 F. Supp. 150 (D. Colo. 1981) (flood insurance).

29. In *West v. Harris*, the court stated that the "change in parties [from private insurers to the federal government] has no effect on the rights of these plaintiffs under the policies issued to them." 573 F.2d at 875 n.1. Thus the court specifically held that federal law applied with regard to both the public and private participants in the program.

573 F.2d at 881. This description and reasoning applies with equal force to the export credit insurance program.[30] Because the Eleventh Circuit's decision in this case is both unfaithful to *Clearfield Trust* and in conflict with decisions in several courts of appeals, review by this Court is now appropriate.

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30. The Eleventh Circuit is at odds with its own prior decision on the issue of applicable law. The decisions in this case and in *Beverly* v. *Macy*, *supra*, which applied federal law to the national flood insurance program, highlight the confusion created by the ruling below.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Eleventh Circuit to review the decision in this case.

Respectfully submitted,

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Dated: December 29, 1987

APPENDIX

NU-AIR MANUFACTURING COMPANY,
a Florida Corporation,
Plaintiff-Appellant,

v.

FRANK B. HALL & CO. OF NEW YORK, a corporation incorporated under the laws of the State of New York, doing business as Intercredit Agency, Aetna Casualty and Surety Company, Inc., *et al.*,
Defendants-Appellees.

No. 86-3359
United States Court of Appeals,
Eleventh Circuit

July 24, 1987

Rehearing and Rehearing En Banc
Denied Aug. 31, 1987

Before TJOFLAT and VANCE, Circuit Judges, and ATKINS,* Senior District Judge.

VANCE, Circuit Judge:

This appeal arises out of a manufacturer's suit against its insurer and insurance broker for misrepresentation, negligence, and breach of contract. The district court granted summary judgment for defendants on all claims. We reverse on all counts.

I. Facts and Procedural History

Nu-Air Manufacturing Co. (hereinafter "Nu-Air") is a Florida Corporation engaged in the business of assembling aluminum goods. In early 1982, Nu-Air negotiated with a Nigerian buyer for the sale of 12 containers of custom-made doors and windows. The Nigerian buyer was to pay half the price by letter of credit and the other half by sight draft upon delivery.

*Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Because of the large size of the order and Nu-Air's unfamiliarity with Nigerian practices, Nu-Air would not accept the order without first obtaining export insurance to cover that portion of the purchase price left unsecured by the letter of credit. Accordingly, Nu-Air designated Intercredit Agency (hereinafter "Intercredit") as its broker.[1] Intercredit, in turn, contacted an export insurer, Foreign Credit Insurance Association (hereinafter "FCIA").[2]

The standard FCIA master policy provides $200,000 in coverage. In order to insure a specific transaction beyond this standard coverage, FCIA will issue a Special Buyer Credit Limit (hereinafter "SBCL"). Nu-Air completed an application for an SBCL in order to increase the $200,000 limit to $371,530.49. Jane Ferry, Intercredit's senior vice president, submitted to FCIA both an application for a master policy and an application for an SBCL.

FCIA frequently approves the master policy and SBCL together because the insured would not want to subscribe to the master policy without the SBCL. Jane Ferry testified that she marked the SBCL application "approved per Michele" after Michele Milone, an FCIA sales representative, telephoned on March 3, 1982 FCIA's approval of both the master policy and SBCL applications. Milone agrees that she telephoned Ferry with a quotation for a master policy, but denies that she communicated FCIA's approval of the SBCL.[3] That same day, Ferry informed Nu-Air that both the master policy and the SBCL had been approved. Nu-Air immediately accepted the Nigerian order, relying on Intercredit's word that insurance coverage was in place. In fact, FCIA had not yet completed the paperwork for

1. Intercredit, a division of one of the nation's largest insurance brokerage firms, specializes in the business of selling export credit insurance.

2. FCIA is an association of private insurance companies. FCIA was established in 1961 at the encouragement of the United States Export-Import Bank. *See generally Lovell Mfg. v. Export-Import Bank of the United States*, 777 F.2d 894, 895 (3rd Cir. 1985).

3. Ferry has dealt with FCIA on a daily basis for approximately 20 years. At the time of this transaction, Milone had only six months experience with FCIA in export credit insurance sales.

the SBCL and had only processed the standard $200,000 master policy.

On March 4, 1982, FCIA delivered to Intercredit a document containing a quotation for a master policy. This document specified a $200,000 limit and made no reference to the SBCL application. One week later, Intercredit forwarded the document to Nu-Air. Jack Healey, Nu-Air's comptroller, reviewed the quotation and executed the document, assuming that FCIA would increase the $200,000 limit to match the $371,530.49 SBCL, which, according to Intercredit, FCIA had already approved.[4] Soon afterwards, Intercredit returned the signed quotation to FCIA, along with Nu-Air's initial deposit towards the premiums. On March 24, 1982, Nu-Air received an FCIA policy. Nu-Air's policy did not include an SBCL endorsement.[5]

Because of import restrictions imposed by the Nigerian government, FCIA concluded that it could not issue Nu-Air an SBCL. On March 19, 1982, FCIA orally informed Intercredit, Nu-Air's broker, that FCIA had decided to withdraw Nu-Air's SBCL application. On April 2, 1982, FCIA mailed written confirmation of this decision to Nu-Air. Nu-Air did not receive this confirmation until April 12, 1982.[6] On March 16, 1982, Nu-Air had begun shipping the order to Jacksonville, Florida, the point of departure for Nigeria. By the time Nu-Air received the notice of cancellation, eight of the twelve containers had already been shipped to Jacksonville and Nu-Air had fabricated almost all of the remaining four.

Immediately after learning that FCIA would not issue an SBCL, Nu-Air contacted Ferry at Intercredit. Ferry informed

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4. Neither Intercredit nor FCIA delivered paperwork concerning the SBCL.

5. Ferry testified that she did not notice the disparity between the $371,530.49 SBCL for which Nu-Air applied and the $200,000 limit specified by Nu-Air's policy until the date of her deposition, a year and a half later. Ferry was not alarmed that she had not received SBCL paperwork because she was under the impression that FCIA had already approved SBCL coverage.

6. Nu-Air did not receive any warning that there were problems with the SBCL before this date.

Healey, the Nu-Air officer responsible for obtaining the insurance, that FCIA had not issued an SBCL and that Nu-Air would not have insurance coverage for the transaction.[7] Ferry advised Healey not to make the shipments. Nevertheless, Nu-Air continued to ship the containers to Jacksonville, and on April 30, 1982, Nu-Air shipped the entire order to Nigeria.[8] On August 15, 1982, the Nigerian buyer defaulted on the sight draft. Subsequent demands for payment met with no success.

In early 1983, Nu-Air notified FCIA of the overdue account and filed a claim under the SBCL. FCIA denied the claim, alleging that no coverage existed. FCIA now contends that Nu-Air failed to give notice or pay premiums within the time restrictions of the policy.

On January 30, 1984, Nu-Air filed this lawsuit against Intercredit and FCIA. Counts I and II of Nu-Air's complaint stated claims against FCIA for breach of insurance contract and negligent misrepresentation. Counts III, IV and V stated three separate claims against Intercredit. Count III alleged that Intercredit breached its oral agreement to procure and maintain insurance. Count IV alleged that Intercredit negligently failed to maintain coverage. Count V alleged that Intercredit negligently misrepresented the existence of coverage. The district court granted the defendants' motion for summary judgment on all counts.[9] We reverse on all counts.

II. The Breach of Contract Claim Against FCIA

We begin by noting that Florida recognizes oral insurance contracts. *Collins* v. *Aetna Ins. Co.*, 103 Fla. 848, 138 So. 369,

7. Neither party suggests in their briefs why *no* coverage was in place. Since it is undisputed that FCIA approved the $200,000 master policy, it appears to this court that at least $200,000 of coverage was in place at the time.

8. Pursuant to the terms of the contract, Nu-Air had to ship the entire order representing a sale price of $630,137.20 in order to collect the 50% portion of the sale covered by the letter of credit. Nu-Air claims that the shipment had little salvage value because it was custom-made to Nigerian specifications.

9. The district judge cited no legal authority of any kind to support her conclusions. None of the conclusions of law in the judge's opinion refer to Nu-Air's claims by count number.

370 (1931); *Monogram Products, Inc.* v. *Berkowitz*, 392 So.2d 1353, 1355 (Fla. Dist. Ct. App. 1980); *Burns* v. *Consolidated Am. Ins. Co.*, 359 So.2d 1203, 1207 (Fla. Dist. Ct. App. 1978); *State Farm Fire & Casualty Co.* v. *Hicks*, 184 So.2d 685, 686 (Fla. Dist. Ct. App.), *cert. denied*, 189 So.2d 634 (1966). Such a contract, like any other contract, results from an offer and an acceptance of that offer. *Rosin* v. *Peninsular Life Ins. Co.*, 116 So.2d 798, 801 (Fla. Dist. Ct. App. 1960). To be enforceable, the agreement must encompass the following essential terms: subject-matter, risk, amount of insurance, premium, duration of risk and identity of parties. *Collins* v. *Aetna Ins. Co.*, 138 So. at 370; *State Farm Fire & Casualty Co.* v. *Hicks*, 184 So.2d at 686.

Michele Milone relayed to Jane Ferry a policy quotation incorporating all of these essential terms.[10] A jury could find that this oral communication constituted an offer to enter into an insurance contract[11] despite the fact that the parties dispute the term in this offer specifying the amount of insurance.[12] Nu-Air contends that it manifested its assent on March 10, 1982 by sending FCIA

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10. According to Ferry, FCIA would customarily telephone Intercredit with the disposition of an SBCL application. If FCIA decided to accept the application, its representative would customarily communicate the details of the policy quotation during this phone call. Ferry and Milone both agree that Milone stated the parameters of the Nu-Air policy quotation during the course of the March 3 telephone conversation. Ferry testified that she jotted down these parameters, and Nu-Air has offered this notation as an exhibit.

11. While a "quotation" is usually considered to invite an offer rather than to make one, Restatement (Second) of Contracts § 26 comment c, Ferry's testimony that Milone's communication included all essential elements of an insurance contract and that the policy had been "approved" raises a jury question as to whether Nu-Air had reason to believe that the quotation was intended as an offer. *Id.; see* E. Farnsworth, *Contracts* § 3.10 at 126-27 (1982).

12. Florida follows the general rule that a broker engaged to procure insurance is the agent of the insured rather than the agent of the insurer. *See Empire Fire and Marine Ins. Co.* v. *Koven*, 402 So.2d 1352, 1353 (Fla. Dist. Ct. App. 1981); *AMI Ins. Agency* v. *Elie*, 394 So.2d 1061, 1062 (Fla. Dist. Ct. App. 1981); *Auto-Owners Ins. Co.* v. *Yates*, 368 So.2d 634, 636 (Fla. Dist. Ct. App.), *cert. denied*, 378 So.2d 351 (1979); 3 Couch on Insurance 2d § 25.95 (Rev. ed. 1984); 43 AmJur2d *Insurance* 113 (1982). Communicating an offer to Intercredit would therefore be tantamount to making the offer directly to Nu-Air. Ferry immediately communicated the parameters of the quotation to Jack Healey at Nu-Air.

an executed document specifying the policy quotation.[13] Nu-Air also sent FCIA an initial deposit on the premiums.[14] Thus a jury could find that a contract was made on that date. *See* 1 S. Williston, *A Treatise On The Law of Contracts* section 66 (3d ed. 1957 & Supp. 1986);[15] E. Farnsworth, *Contracts*, 136 (1982).[16]

To be sure, the parties dispute an important factual question: whether Michele Milone communicated FCIA's approval of Nu-Air's SBCL application at the same time she gave Jane Ferry the quotation on the master policy. A jury must decide whether FCIA offered to provide the full $371,530.49 in requested coverage or only the $200,000 in coverage that is standard for an FCIA master policy. If the jury believes Michele Milone, it may find that the final contractual term specifying the amount of insurance corresponded to the $200,000 limit that is standard for an FCIA master policy. Alternatively, if the jury believes Jane Ferry, it may find that this term corresponded to the amount specified in Nu-Air's SBCL application. This dispute does not alter our conclusion that a jury could find that a contract was entered into on March 10, 1982.

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13. Though this document specified the standard $200,000 aggregate limit, the SBCL would supersede this figure.

14. It is stipulated that Intercredit forwarded these materials to FCIA and that FCIA retained the premium deposit. Under Florida law, an acceptance becomes binding when it is communicated to the offeror. *See Mintzberg* v. *Golestaneh*, 390 So.2d 759, 760 (Fla. Dist. Ct. App. 1980); *Kendel* v. *Pntious*, 244 So.2d 543, 544 (Fla. Dist. Ct. App. 1971), *cert. discharged*, 261 So.2d 167 (1972).

15. The formation of a contract "depends not upon an actual meeting of the minds, but merely upon manifestations of assent. . . . " 1 S. Williston, *A Treatise on the Law of Contracts*, § 66 (3d ed. 1957); *See also* E. Farnsworth, *Contracts* § 3.6 at 114 (1982) (test is whether offeree's actions, judged by a standard of reasonableness, manifest an intention to accept).

16. Even if the policy quotation did not constitute an offer, under an alternate form of analysis a jury could find that FCIA's failure to notify Nu-Air that FCIA did not intend to accept Nu-Air's application constituted acceptance. *See* Restatement (Second) of Contracts § 69(1)(c). In any event, FCIA's retention of Nu-Air's initial deposit raises an issue of fact as to whether FCIA accepted Nu-Air's offer. *See* Restatement (Second) of Contracts § 69(2); *see, e.g., Empire Machine Co.* v. *Litton Business Telephone Sys.*, 115 Ariz. 568, 566 P.2d 1044 (1977).

Courts must determine the terms of a contract by ascertaining the intent of the parties at the time they enter into the agreement. *See, e.g., J&S Coin Operated Machines, Inc.* v. *Gottlieb*, 362 So.2d 38, 39 (Fla. Dist. Ct. App. 1978). The lower court, nevertheless, held that an agreement to provide the full $371,530.49 in requested coverage would be unenforceable because the master policy contemplated that FCIA would approve the SBCL "by written notification."[17] Although Nu-Air did not receive the final version of the master policy until March 24, the parties may have negotiated with this document in mind. Nevertheless, if FCIA informed Nu-Air that SBCL coverage had already been approved, this understanding became part of the final contract.

Florida law requires that we resolve a conflict between the provisions of an insurance contract so as to afford maximum coverage to the policyholder. *See Dyer* v. *Nationwide Mut. Fire Ins. Co.*, 276 So.2d 6, 8 (Fla. 1973); *Oliver* v. *United States Fidelity & Guar. Co.*, 309 So.2d 237, 238 (Fla. Dist. Ct. App.), *cert. denied*, 322 So.2d 913 (1975). This principle applies with even greater force when the draftsman of a form policy relies on inconspicuous language to defeat the very purpose for which the policy was procured. *See Braley* v. *American Home Assurance Co.*, 354 So.2d 904, 906 (Fla. Dist. Ct. App.), *cert. denied*, 359 So.2d 1210 (1978); *Roberson* v. *United Services Auto. Ass'n*, 330 So.2d 745, 746 (Fla. Dist. Ct. App. 1976), *cert. denied*, 342 So.2d 1104 (1976). Accordingly, if FCIA offered to provide full coverage, it may not rely on language in the master policy to defeat Nu-Air's legitimate expectation of full coverage. *See Braley*, 354 So.2d at 906.

To rehabilitate the lower court's reasoning, FCIA argues that the parties intended that the oral agreement would not become binding until reduced to a writing. If this was the intention of the

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17. Article IV.B. of the master policy provides: "The amount of the credit limit for any particular buyer shall be:

> 1. The amount of the Discretionary Credit Limit Authorized in the declarations; or
>
> 2. Such other amount as the Insurers shall approve by written notification to the Insured of a Special Buyer Credit Limit."

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parties, we would give it effect. *See Club Eden Roc, Inc.* v. *Tripmasters, Inc.*, 471 So.2d 1322, 1323-24 (Fla. Dist. Ct. App. 1985) (memorandum clearly stated that no rights or obligations will arise until the execution of a formal agreement), *review denied*, 482 So.2d 350 (Fla. 1986); *Shipley* v. *Ohio Nat'l Life Ins. Co.*, 199 F. Supp. 782, 783 (W.D. Pa. 1961) (insurance application required final contract to be in writing), *aff'd on other grounds*, 296 F.2d 728 (3rd Cir. 1961). The mere fact that the parties contemplated future writings does not evince this intent, however, and FCIA does not point to a whit of convincing evidence. *See Collins* v. *Aetna Ins. Co.*, 103 Fla. 848, 138 So. 369, 370 (Fla. 1931); Restatement (Second) of Contracts § 27 (1981).

If anything, the record shows that FCIA is notoriously slow in processing its paperwork. Nu-Air could accept the Nigerian contract and begin manufacturing containers only by relying upon its understanding that insurance coverage was in place. The fabric of commerce depends upon interlocking strands of contractual agreements. This fabric would unravel if the creation of contract rights and obligations depended solely upon the flow of paper.

The lower court also held that FCIA had properly withdrawn coverage pursuant to a termination clause in the master policy. The termination clause, however, provided that FCIA could only terminate coverage "upon thirty days prior written notice."[18] "Shipments" made before the effective date of termination would remain covered.[19] In the present case, all goods left the United

18. Article XI.J.2. provides:

> The policy may be terminated by the Insurers or the Insured upon 30 days prior written notice by either to the other. In the event of termination, the Insured shall not be liable for payment of any premium for any shipment made after the effective date of termination and the Insurers shall not be liable for any loss arising from any shipment made subsequent to such date.

We assume *arguendo* that this termination provision became part of the oral contract.

19. The parties vigorously dispute the meaning of the term "shipment." Nu-Air contends that "shipment" began on the date when the goods left Nu-Air's Tampa factory. Support for this construction comes directly from the policy which defines the "insured transaction" as a sale of products "shipped

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States for Nigeria on April 30, 1982. Nu-Air had no warning that there were problems with its insurance coverage until April 12. On that date, Nu-Air received written confirmation of FCIA's decision to withdraw the SBCL application.[20] Clearly, the April 12 communication did not give the requisite thirty days notice and therefore could not effectively terminate insurance coverage.

FCIA argues that Nu-Air received effective notice on March 19 when the insurance company informed Intercredit that Nu-Air's SBCL application had been rejected. We disagree for two reasons. First, the termination clause requires "written notice," whereas the March 19 communication was oral. If FCIA chooses to invoke such clauses, it must abide by their explicit terms. *See Graves* v. *Iowa Mut. Ins. Co.*, 132 So.2d 393, 395 (Fla. 1961). Second, Florida adheres to the generally accepted rule that notice to the insured's broker does not terminate coverage unless the broker procures a substitute policy of like amount. *See generally Cat 'N Fiddle, Inc.* v. *Century Ins. Co.*, 213 So.2d 701, 704 (Fla. 1968); 45 C.J.S. § 450(2) (1946).[21] This rule

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from the United States . . . such shipment to begin when the products are placed en route to the buyer . . . ." An accompanying FCIA publication explains that coverage begins "when the goods leave the factory." On the other hand, FCIA and the district court take the position that shipment occurred on April 30, when the goods left the United States. Florida law requires that courts construe insurance policies so as to provide the broadest possible coverage to the insured. *See, e.g. Hulse* v. *Blue Cross/Blue Shield of Florida, Inc.*, 424 So.2d 191, 192 (Fla. Dist. Ct. App. 1983); *Davis* v. *Crown Life Ins. Co.*, 696 F.2d 1343, 1345 (11th Cir. 1983). Adopting Nu-Air's construction of the term "shipment," we note that 8 of the 12 containers left Tampa by April 14. Even if effective notice were received on March 19, it would not take effect for 30 days and therefore would only terminate coverage on the 4 remaining containers.

20. "Where a policy provides for written notice of cancellation, but does not specify the method of giving the written notice, and the notice is given by mail, the effective date of cancellation generally is to be determined based on the date of receipt of the notice by the insured." *Aetna Ins. Co.* v. *Settembrino*, 324 So.2d 113, 114 (Fla. Dist. Ct. App. 1975). In fact, Nu-Air would be completely covered even if the effective date of termination is calculated from the date FCIA mailed this notice of withdrawal, April 2.

21. Florida recognizes an exception to this rule where the agency relationship "was essentially unlimited, that for all intents and purposes [the broker] was the alter ego of the [the insured] in handling the latter's insurance matters,

takes root from an important policy. Notice must clearly convey to the insured the fact of termination so that he may obtain other insurance and avoid being subjected to risk without coverage. *See Cat 'N Fiddle, Inc.*, 213 So.2d at 704; *Graves*, 132 So.2d at 394-95. As the facts of the present case well demonstrate, notice to a broker is a most precarious means of securing this goal.

Finally, the lower court concluded that Nu-Air lost its ability to recover under the policy because Nu-Air failed to provide timely notice of loss and delayed paying premiums. This was also error. The only reason FCIA ever articulated in rejecting Nu-Air's claim was an unconditional denial that the coverage had ever been in force. Where an insurer unconditionally denies liability, it waives all policy provisions governing notification of loss, proof of loss, and payment of premiums:

> [A]s a matter of law, the effect of the thus-found-to-be-improper repudiation of coverage was to waive any right to insist upon the insureds' necessarily-thus-futile compliance with the various conditions to recovery—including notice . . . .

Wegener v. *International Bankers Insurance Co.*, 494 So.2d 259 (Fla. Dist. Ct. App. 1986), *review denied*, 504 So.2d 767 (Fla. 1987); *see, e.g., Hartford Accident & Indem. Co.* v. *Phelps*, 294 So.2d 362, 365 (Fla. Dist. Ct. App. 1974); *American Ins. Co. of Newark, N.J.* v. *Burson*, 213 F.2d 487, 490 (5th Cir. 1954). The lower court's conclusion was erroneous for the additional reason that FCIA accepted the delinquent premiums. An insurer cannot retain past-due premiums and at the same time claim that a forfeiture of the policy has occurred. *Travelers Indem. Co.* v. *Dana*, 434 So.2d 48 (Fla. Dist. Ct. App. 1983); *Mixson* v. Allstate Ins. Co., 388 So.2d 608, 609 (Fla. Dist. Ct. App. 1980), *review denied*, 397 So.2d 777 (1981); *Meeks* v. *State Farm Mut. Auto. Ins. Co.*, 460 F.2d 776, 778 n.3 (5th Cir. 1972).

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including the exercise of discretion encompassing an increased risk of loss to [the insured]." *Cat 'N Fiddle Inc.* v. *Century Ins. Co.*, 213 So.2d at 707.

FCIA suggests that it stands above these general principles of waiver and estoppel because it issues insurance on behalf of a United States government agency, the Export-Import Bank of the United States (hereinafter "Eximbank"). Specifically, FCIA argues that a failure to strictly comply with policy provisions bars recovery whenever the insurer acts as an agent of the United States government.[22] This bold supposition apparently derives from a leading Supreme Court case, *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947).[23] A brief summary of that opinion, however, demonstrates that FCIA's reading is too broad.

In *Federal Crop Insurance Corp.* v. *Merrill*, a farmer had insured reseeded wheat contrary to Federal Crop Insurance Corporation regulations. *Id.*, at 382, 68 S.Ct. at 2. Though the farmer had no knowledge of the regulations and was in fact misled by the government agent, the Supreme Court refused to apply notions of waiver and estoppel. *Id.* Instead, the Court reasoned that Congress had expressly delegated its rule-making

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22. Congress created Eximbank to provide, among other things, export insurance to American exporters. We assume *arguendo* that FCIA acted as Eximbank's agent with respect to the disputed coverage. In fact, this matter is not free from doubt. According to the policy, Eximbank insures "political risks and no other." FCIA insures "commercial risks," which include "failure of the buyer to pay to the Insured within six months after *due date* of payment, the amount due for products delivered to and accepted by the buyer." Even though Eximbank reinsures commercial risk, this may not be enough to establish an agency relationship. The reinsurance agreements only run between Eximbank and FCIA.

23. FCIA also cites district court cases. All involve governmental defendants and ultimately rely—directly or indirectly—upon *Federal Crop Insurance Corp.* v. *Merrill*. *See, e.g., Victoria Camera, Inc.* v. *Giuffrida*, 566 F. Supp. 796, 798 (S.D.N.Y. 1983); *Pavone, Inc.* v. *Secretary of H.U.D.*, 547 F. Supp. 230, 232 (D.Conn. 1982); *Klein* v. *Pierce*, 554 F. Supp. 18, 20 (S.D.N.Y. 1982); *Cross Queen, Inc.* v. *Director, Fed. Emergency Management Agency*, 516 F. Supp. 806, 809 (D.V.I. 1980). While some lower courts have extracted a broad principle from the original Supreme Court opinion, we do not find these decisions persuasive.

power to the administrative agency, and as a result, the administrative regulations limited the government's liability in the same way as legislation enacted directly by Congress:

> [This result] merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury. The "terms and conditions" defined by the Corporation, under authority of Congress, for creating liability on the part of the Government preclude recovery for the loss of the reseeded wheat no matter with what good reason the respondents thought they had obtained insurance from the Government.

Id., at 385, 68 S.Ct. at 3.

The entire logic of *Federal Crop Insurance Corp.* v. *Merrill*, boils down to the proposition that a plaintiff who contracts with a governmental defendant "[assumes] the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Id.* at 384, 68 S.Ct. at 3. We find nothing in the Supreme Court's reasoning that bears any application to private contractual arrangements between private litigants.

The present case is further distinguished from *Federal Crop Insurance Corp.* v. *Merrill* because, under the specific terms of the policy, FCIA remains the sole insurer. Though FCIA may recoup its losses under a separate agreement between FCIA and Eximbank, Nu-Air is not a party to that arrangement. Therefore, unlike the farmer in *Federal Crop Insurance Corp.* v. *Merrill*, Nu-Air's claim is not directed toward the public treasury:

> [Rather], it is FCIA's potential claim against the government under the reinsurance agreements, and not [the insured's], which is directed toward the public fisc; this is not the case before us.

Lovell Mfg. v. *Export-Import Bank of United States*, 777 F.2d 894, 901 (3d Cir. 1985). We conclude that traditional equitable principles of waiver and estoppel apply. *Id.*[24] [25]

III. The Misrepresentation Claim against FCIA

FCIA also relies upon its relationship with Eximbank to assert "official immunity" from Nu-Air's misrepresentation claim. We conclude that the lower court erred in granting this immunity.

The official immunity doctrine, largely judge-made, is not a rigid rule of decisionmaking. Rather, the Supreme Court has advised "a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens." *Doe* v. *McMillan*, 412 U.S. 306, 320, 93 S.Ct. 2018, 2028, 36 L.Ed.2d 912 (1973). Courts extend official immunity where the threat of liability "might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." *Barr* v. *Matteo*, 360 U.S. 564, 571, 79 S.Ct. 1335, 1339, 3 L.Ed.2d 1434 (1959).[26] Not surprisingly, this concern arises most frequently when the defendant is an individual in public service. *See, e.g.*, *Doe* v. *McMillan*, 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912 (U.S. Public Printer and Superintendent of Documents); *Barr* v. *Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (Director

24. We leave open the question of the extent to which federal law governs insurance contracts issued on behalf of Eximbank.

25. The district court held that Nu-Air failed to mitigate damages when Nu-Air pressed forward with the Nigerian transaction after discovering the FCIA had repudiated coverage. Though the district court assumed that Nu-Air could renegotiate the Nigerian contract, the defendants present no evidence that such was the case. Whether or not Nu-Air acted reasonably to limit its losses is a question of fact for the jury.

26. There are other less frequently articulated reasons for affording official immunity; the deterrent effect of liability on those who might enter public service; the drain of litigation on government time and resources; the inequity of liability for the acts of subordinates; the notion that public servants owe a duty to the public, not the individual; and the notion that civil suits are an inappropriate method of enforcing official accountability. *Gray* v. *Bell*, 712 F.2d 490, 496-97 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). These additional justifications most certainly do not apply where the defendant is a private insurance company.

of Rent Stabilization Office); *Claus* v. *Gyorkey*, 674 F.2d 427 (5th Cir. 1982) (VA Hospital Chief of Lab Services); *Evans* v. *Wright*, 582 F.2d 20 (5th Cir. 1978) (H.E.W. employees).

The justifications for immunity will seldom be present, however, when the defendant's connection with government is limited to a business relationship. Once shielded from tort liability, there is always the danger that a private enterprise will become too fearless, too vigorous and too effective. Thus, courts have only extended official immunity to the private sector on those rare occasions when the need is pressing. Two cases upon which FCIA relies prove the point. Both are defamation actions resulting from reports prepared by private industry for government agencies. *See Bushman v. Seiler*, 755 F.2d 653 (8th Cir. 1985) (consultant to insurance carrier investigating medicare fraud); *Becker v. Philco Corp.*, 372 F.2d 771 (4th Cir.), *cert. denied*, 389 U.S. 979, 88 S.Ct. 408, 19 L.Ed.2d 473 (1967) (defense contractor preparing security reports on employees). Clearly, exposing informants to this kind of liability frustrates paramount government objectives such as uncovering fraud in government programs and protecting national security. Immunity under these circumstances serves an obvious governmental purpose:

> Applying immunity here is consistent with protecting "officials who are required to exercise their discretion", and promoting the "public interest in encouraging the vigorous exercise of official authority."

Bushman, 755 F.2d at 656 (quoting *Butz* v. *Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894, 2911, 57 L.Ed.2d 895 (1978)).[27] In contrast, FCIA does not identify how immunizing misrepresentations to its customers serves an equivalent purpose or, for that matter, any worthwhile purpose.

The remaining cases advanced by FCIA do not deal with official immunity at all, but center upon an altogether different

27. In fact, the common law arrives at this same result by affording such defendants a "qualified privilege." *See generally* W. Prosser, *The Law of Torts*, § 115 (4th ed. 1971); *see, e.g., Bradley* v. *Computer Sciences Corp.*, 643 F.2d 1029, 1032 (4th Cir.), *cert. denied*, 454 U.S. 940, 102 S.Ct. 476, 70 L.Ed.2d 248 (1981).

concept—sovereign immunity. In *Matranga* v. *Travelers Ins. Co.*, 563 F.2d 677 (5th Cir. 1977) and *Peterson* v. *Weinberger*, 508 F.2d 45 (5th Cir.), *cert. denied*, 423 U.S. 830, 96 S.Ct. 50, 46 L.Ed.2d 47 (1975), we dealt with actions against insurance companies for improperly withholding payments due on medicare claims. These insurance carriers were medicare fiscal intermediaries; the United States government provided the funds. In addition, Department of Health, Education and Welfare regulations explicitly state that "[t]he Secretary . . . is the real party in interest in the administration of the program." 20 C.F.R. § 405.670 (1973). As a result, we concluded that these suits were barred because they were actually directed against the United States government. *See Matranga*, 563 F.2d at 677-78; *Peterson*, 508 F.2d at 51-52. Wholly different considerations operate in the present case because Eximbank and the United States are not financially at risk.

Finally, we cannot ignore the language in the legislation creating Eximbank: "[T]he bank is authorized and empowered . . . to sue and be sued, to complain and to defend in any court of competent jurisdiction." 12 U.S.C. § 635(a). Immunity is not favored when a government agency enters the commercial sphere:

> [W]hen Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense . . . . [I]t must be presumed that when Congress launched a government agency into the commercial world and endowed it with authority to "sue or be sued," that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.

Franchise Tax Bd. of California v. *United States Postal Serv.*, 467 U.S. 512, 104 S.Ct. 2549, 81 L.Ed.2d 446 (1984) (quoting *FHA* v. *Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 490, 84 L.Ed. 724 (1940)); *see also Brady* v. *Roosevelt Steamship Co.*, 317 U.S. 575, 581, 63 S.Ct. 425, 428, 87 L.Ed. 471 (1943); *Rochester Methodist Hosp.* v. *Travelers Ins. Co.*, 728 F.2d 1006, 1012-16 (8th Cir. 1984). Since there is no reason to think that Eximbank would be immune from suit, *see, e.g., Enterprise Tools, Inc.* v. *Export-Import Bank of the U.S.*, 564 F. Supp. 761, 763 (E.D. Ark. 1983), FCIA cannot derive immunity as Eximbank's agent. Accordingly, we hold that Nu-Air should have the opportunity to present its tort claim against FCIA to a jury.[28]

IV. Nu-Air's Claims Against Intercredit

The district court rejected Nu-Air's entire cause of action against Intercredit. We conclude that the district court reached this surprising result by misapplying the law to key issues, which were actually questions of fact for the jury. In order to more fully explain our holding, we must briefly set forth the relevant law governing the relationship between Intercredit and Nu-Air.

When a broker agrees to obtain insurance for a client, the broker becomes the client's agent. *See, e.g., Bennett* v. *Berk*, 400 So.2d 484, 485 (Fla. Dist. Ct. App. 1981); *First Nat'l Ins. Agency* v. *Leesburg Transfer & Storage, Inc.*, 139 So.2d 476, 479 (Fla. Dist. Ct. App. 1962). As agent, the broker owes his client a duty of care and a duty to exercise the skill he holds himself out as having. Restatement (Second) of Agency § 379 and comment c (1957); *see, e.g., Klonis ex rel. Consolidated Am. Ins. Co.* v. *Armstrong*, 436 So.2d 213, 217 (Fla. Dist. Ct. App. 1983),

28. Although the lower court came to a contrary conclusion, the record does not sufficiently show for purposes of summary judgment that Nu-Air unjustifiably relied on the alleged misrepresentations or negligently failed to ascertain the facts. *See McCurley* v. *Auto-Owners Ins. Co.*, 356 So.2d 68, 69 (Fla. Dist. Ct. App. 1978). Whether FCIA and Intercredit negligently made false statements to Nu-Air and whether Nu-Air reasonably relied on the misrepresentations to its detriment are questions for a jury to determine. *Horn* v. *First Orlando Realty Management Corp.*, 483 So.2d 80 (Fla. Dist. Ct. App. 1986).

review denied, 449 So.2d 264 (1984); *Sheridan* v. *Greenberg*, 391 So.2d 234, 236 (Fla. Dist. Ct. app. 1980); *Butler* v. *Scott*, 417 F.2d 471, 473 (10th Cir. 1969). A breach of these duties may subject the broker to liability in both contract and tort. *Monogram Products, Inc.* v. *Berkowitz*, 392 So.2d 1353, 1355 (Fla. Dist. Ct. App. 1980); *First Nat'l Ins. Agency* v. *Leesburg Transfer & Storage, Inc.*, 139 So.2d 476, 479 (Fla. Dist. Ct. App. 1962); Restatement (Second) of Agency § 401 comment a (1957). In addition, if a broker falsely represents that a policy has been approved, he may become liable for negligent misrepresentation. *See, e.g., Meltsner* v. *Aetna Casualty & Ins. Co.*, 177 So.2d 43 (Fla. Dist. Ct. App. 1965), *cert. denied*, 184 So.2d 886 (1966).

Intercredit successfully argued before the district court that it had discharged its duties as broker when FCIA agreed to insure Nu-Air under the master policy. We disagree. As a professional, a broker "is charged with the ability to do more than simply fill out application forms." *Bell* v. *O'Leary*, 744 F.2d 1370, 1373 (8th Cir. 1984). A broker must take all reasonable steps necessary to ensure that insurance is in place. *See Sheridan* v. *Greenberg*, 391 So.2d at 236; *Haeuber* v. *Can-Do, Inc. II.*, 666 F.2d 275, 280 (5th Cir. Unit A 1982). Regardless of whether the jury believes Michelle Milone or Jane Ferry, there is sufficient evidence to support a finding that Intercredit breached its duty to Nu-Air.

If Michele Milone is testifying truthfully, Intercredit incorrectly informed Nu-Air that SBCL coverage was in place. A jury could find that this misrepresentation and Intercredit's subsequent failure to correct its initial error amounted to a negligent breach of Intercredit's duty to Nu-Air. A jury could also hold Intercredit liable for the tort of negligent misrepresentation.

While it is true that Jane Ferry denied that there was a misrepresentation, the jury could nevertheless find a breach of duty even if it accepts her testimony as truthful. Most of the communications between Nu-Air and FCIA passed through Intercredit as intermediary, yet, Intercredit remained blissfully unaware of the

impending crisis. A broker must possess a reasonable knowledge of its business and a reasonable familiarity with the paperwork. *See Seascape of Hickory Point Condominium Ass'n* v. *Associated Ins. Services,* 443 So.2d 488 (Fla. Dist. Ct. App. 1984). In fact, Jane Ferry testified that she did not notice the disparity between the requested coverage and the $200,000 limit recited by the relevant documents until the time of her deposition. A jury could find that Intercredit breached its duty to Nu-Air when the broker failed to detect the problems with its client's insurance coverage at an earlier date.

Intercredit must also account for its failure to inform Nu-Air that FCIA had withdrawn Nu-Air's SBCL application.[29] Three weeks elapsed between the time FCIA informed Intercredit and the date when Nu-Air finally received notice from FCIA. An agent is subject to the duty to keep his principal informed. This duty exists when the agent learns facts the principal would desire to know. *See* Restatement (Second) of Agency § 381 and comment a (1957). Accordingly, a broker, who is not to blame for the failure to obtain coverage, may become liable for damages if he fails to inform his principal that the requested insurance has not been procured. *DeMarlor* v. *Foley Carter Ins. Co.,* 386 So.2d 22, 23 (Fla. Dist. Ct. App. 1980); *Cat 'N Fiddle, Inc.* v. *Century Ins. Co.,* 200 So.2d 208, 211 (Fla. Dist. Ct. App. 1967), *vacated on other grounds,* 213 So.2d 701 (Fla. 1968). When a broker learns his client's insurance has been cancelled, this same duty requires the broker to notify the insured within a reasonable period of time. *Johnson* v. *Aetna Casualty & Surety Co.,* 448 So.2d 1056, 1058 (Fla. Dist. Ct. App.), *review denied,* 458 So.2d 273 (Fla. 1984); *Cat 'N Fiddle* v. *Century Ins. Co.,* 200 So.2d at 211. A jury could find that Intercredit breached this duty to Nu-Air when the broker failed to warn its client that FCIA would not supply the requested insurance.[30]

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29. It is undisputed that Intercredit never communicated this fact to Nu-Air.

30. Intercredit is therefore wrong to suggest that it could not be liable if FCIA properly availed itself of policy provisions which gave FCIA the right to withdraw coverage.

Nevertheless, the district court reasoned that any negligence on the part of Intercredit was unimportant because it was unreasonable for Nu-Air to believe its broker.[31] The district court advanced two reasons why Nu-Air unjustifiably relied upon Intercredit's representations that coverage was in place. First, the master policy gave FCIA the right to withdraw coverage at the insurer's discretion. Second, Nu-Air executed a document which specified a $200,000 aggregate limit and made no provision for SBCL coverage.

The thrust of the district court's argument appears to be that a broker cannot be held accountable for its misrepresentations so long as the customer has been exposed to the same technical policy information as the broker.[32] Such reasoning misperceives the fundamental nature of the broker-client relationship. This relationship arises from "trust and confidence consensually placed in the superior knowledge, skill and judgment of [the broker]." *Butler* v. *Scott*, 417 F.2d 471, 473 (10th Cir. 1969) (citation omitted). While there is a point at which this trust becomes unreasonable, this determination should not be made on a motion for summary judgment. *See, e.g., McCurley* v. *Auto-*

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31. Ruling that Nu-Air's reliance was unjustified allowed the court to further rule that Nu-Air acted unreasonably in not taking more appropriate measures to protect itself. These two rulings, if allowed to stand, would severely compromise Nu-Air's cause of action. Under Florida law, an insured's failure to mitigate damages may operate as a waiver and estoppel against the right to assert claims arising from the broker-client relationship. *Keller Indus.* v. *Bellefonte Ins. Co.*, 412 So.2d 899 (Fla. Dist. Ct. App. 1982) (quoting *Burns* v. *Consolidated Am. Ins. Co.*, 359 So.2d 1203, 1206 (Fla. Dist. Ct. App. 1978)). Nu-Air's negligent misrepresentation claim would also fail because justifiable reliance is a key element of that tort. *See, e.g., Bruce* v. *American Dev. Corp.*, 408 So.2d 857 (Fla. Dist. Ct. App. 1982).

The lower court advances an additional reason why Nu-Air acted unreasonably. Apparently, the lower court concluded that Nu-Air should have purchased pre-shipment insurance to protect itself against the risk that FCIA would wrongly repudiate the post-shipment insurance before the goods were actually shipped. This is error. Nu-Air had the right to assume that its insurer would act in good faith.

32. The parties dispute how much of this technical information Intercredit passed on to Nu-Air.

Owners Ins. Co., 356 So.2d 68 (Fla. Dist. Ct. App. 1978).[33] Thus, we remand Nu-Air's tort and contract claims against Intercredit for trial before a jury.

REVERSED and REMANDED.

33. *See supra* note 28.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NU-AIR MANUFACTURING COMPANY,
A Florida Corporation,
Plaintiff-Appellant,

v.

FRANK B. HALL & CO. OF NEW YORK, A Corporation incorporated under the laws of the State of New York, doing business as Intercredit Agency, AETNA CASUALTY AND SURETY COMPANY, INC., *ET AL.*,
Defendants-Appellees.

No. 86-3359

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion July 24, 1987, 11 Cir., 198 , F.2d).

(August 31, 1987)

Before: TJOFLAT and VANCE, Circuit Judges, and ATKINS[1], Senior District Judge

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

.....
United States Circuit Judge

1. Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-3359

D.C. Docket No. 84-109-17

NU-AIR MANUFACTURING COMPANY,
A Florida Corporation,
Plaintiff-Appellant,

versus

FRANK B. HALL & CO. OF NEW YORK, A Corporation incorporated under the laws of the State of New York, doing business as Intercredit Agency, AETNA CASUALTY AND SURETY COMPANY, INC., *ET AL.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before TJOFLAT and VANCE, Circuit Judges, and ATKINS[1], Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be and the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

1. Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs of appeal to be taxed by the Clerk of this Court.

Entered: July 24, 1987
For the Court: Miguel J. Cortez, Clerk

By: .....
Deputy Clerk

ISSUED AS MANDATE: Oct. 15, 1987

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

NU-AIR MANUFACTURING COMPANY,
Plaintiff(s),

vs.

FRANK B. HALL & COMPANY OF NEW YORK, et al.,
Defendant(s).

CASE NO. 84-109-CIV-T-17

MEMORANDUM OPINION

This cause is before the Court on Defendant's, Frank B. Hall & Company of New York, hereinafter Frank B. Hall, motion to strike attorney's fees from Count's III, IV, and V, filed with this Court April 17, 1984; Defendants', Foreign Credit Insurance Association and its member companies, collectively FCIA, motion for summary judgment, filed with this Court January 29, 1985; and Defendant's, Frank B. Hall & Company of New York, d/b/a Intercredit Agency, motion for summary judgment filed with this Court March 4, 1985.

JURISDICTION

The basis of federal jurisdiction is 28 U.S.C. § 1332. Plaintiff, Nu-Air Manufacturing Company (Nu-Air), a Florida corporation, is suing Defendants Frank B. Hall & Company of New York, d/b/a/ Intercredit Agency (Intercredit), New York Corporation, and the Foreign Credit Insurance Company (FCIA), an unincorporated association of insurance companies which is headquartered in New York.

SUMMARY JUDGMENT STANDARD

This circuit clearly holds that summary judgment should only be entered when the moving party has sustained its burden of

showing the absence of a genuine issue as to any material fact when all the evidence is viewed in the light most favorable to the nonmoving party. *Sweat* v. *The Miller Brewing Co.* 708 F.2d 655 (11th Cir. 1983). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party, not assessing the probative value of any evidence. *Hayden* v. *First National Bank of Mt. Pleasant*, 595 F.2d 994, 996-97 (5th Cir. 1979), quoting *Gross* v. *Southern Railroad Co.*, 414 F.2d 292 (5th Cir. 1969).

STATEMENT OF THE CASE

This action concerns an export credit insurance policy issued to Plaintiff Nu-Air by Defendant Foreign Credit Insurance Association (FCIA). Defendant Intercredit acted as broker in connection with the policy, including the application for the policy. Nu-Air's claims [sic] that Intercredit advised Nu-Air that FCIA had agreed not only to issue to Nu-Air the export credit insurance policy, but also that FCIA had agreed to provide Nu-Air, through an endorsement to the policy commonly known as a Special Buyer Credit Limit ("SBCL"), with specific coverage against the risk that Nu-Air's Nigerian customer, Dukans, would not make payment in connection with Nu-Air's proposed shipment of aluminum windows and doors to Dukans in Nigeria.

Nu-Air claims that as a result of this representation from Intercredit, FCIA is liable to Nu-Air as a matter of contract law when Dukans, in fact, failed to make full payment to Nu-Air for the shipment of windows and doors. FCIA disputes that it ever represented to Intercredit that it would approve the Special Buyer Credit Limit. Intercredit insists that FCIA made this representation. Defendants FCIA and Intercredit, in response to Nu-Air's claims, also have asserted various affirmative defenses.

Nu-Air alternatively claims that, even assuming FCIA is not liable to Nu-Air as a matter of contract law because FCIA, in fact, never advised Intercredit that it would approve the SBCL, FCIA still is liable to Nu-Air because Intercredit was acting as FCIA's agent when it represented to Nu-Air that FCIA would

issue the SBCL, because Intercredit's representations were negligent, and because Plaintiff relied on these negligent misrepresentations to its detriment by manufacturing the windows and doors and ultimately shipping them to Dukans.

Nu-Air also claims that Intercredit is liable to Nu-Air because Intercredit breached its contract with Nu-Air by which Intercredit agreed to secure export credit insurance coverage for Nu-Air's proposed transaction with Dukans. Alternatively, Nu-Air claims that Intercredit is liable to Nu-Air because Intercredit negligently failed to maintain export credit insurance for Nu-Air transaction [sic]. Finally, Nu-Air also claims that Intercredit is liable to Nu-Air because Intercredit negligently misrepresented to Nu-Air that FCIA would provide coverage for Nu-Air's transaction with Dukans and that Nu-Air relied on this representation to its detriment.

As cross-claimant, FCIA seeks indemnification from Intercredit based on the principle that FCIA is liable at all [sic], is only vicariously liable to Nu-Air because of the negligent representation of its purported agent, Intercredit. Alternatively, FCIA seeks contribution from Intercredit based on the principle that if FCIA is liable to Nu-Air, Intercredit must contribute to Nu-Air's recovery because its actions also contributed to Nu-Air's injuries.

STATEMENT OF THE FACTS

Plaintiff, a Florida Window and door manufacturer, in early 1982, submitted applications to Frank B. Hall, d/b/a Intercredit Agency (Intercredit), an insurance agency representing Foreign Credit Insurance Association (FCIA) a group of insurers who issue export credit insurance for a master credit insurance policy and a special buyer's credit limit (SBCL). The SBCL was a request to insure against nonpayment, one-half of a specific proposed order for $740,000 of windows and doors from a Nigerian company (Dukans).

In January and February of 1982, Frank B. Hall d/b/a Intercredit Agency (hereinafter known as "Intercredit"), acting on

the request of Nu-Air through its Treasurer, John J. Healey, applied for a Master Export Credit Insurance Policy on behalf of Nu-Air through FCIA and also requested an SBCL for Dukans in the amount of $371,530.49. FCIA insurance protects an exporter against various defined commercial and political risks that the foreign insurer will not make payment for goods shipped as a part of an FCIA eligible transaction. For an additional premium payment, FCIA also makes available to certain insureds, pre-shipment coverage which protects the insured against various pre-shipment risks, including the risk that FCIA will withdraw coverage for a specific shipment before shipment has been made. Absent a pre-shipment endorsement to a standard FCIA policy, only losses occurring after shipment are covered under the standard FCIA policy.

In February, 1982, Intercredit forwarded the applications to FCIA and on March 3, 1982, Jane Ferry, Senior Vice President of Intercredit, while acting within the scope of her authority and as agent for FCIA, allegedly advised Plaintiff that FCIA had approved the issuance of a master export credit insurance policy and the Dukans SBCL. Ferry claims that she was advised by Michele Milone, FCIA Sales Assistant, that Nu-Air's application for the Master Export Credit Insurance Policy and the SBCL for Dukans in the amount of $371,530.49 were approved. Ferry (Intercredit) notified Healey (Nu-Air) of such approval. Intercredit, on March 3, 1982, allegedly quoted a rate for the policy, with aggregate limit of $200,000, which Plaintiff accepted and subsequently paid. Moreover, no terms or conditions of the SBCL were provided.

Plaintiff alleges that after securing the Dukans SBCL, Plaintiff advised Dukans that it could now accept their order and immediately began the assembly of the doors and windows, which consisted of twelve (12) shipping containers.

On April 12, 1982, Plaintiff received a letter from FCIA stating that the Dukans SBCL was not approved and was considered withdrawn because of the Nigerian Government's ban on imports. FCIA would not reconsider approval. At this time,

Plantiff [sic] had already fabricated most of the order and had transported 8 of the 12 shipping containers from its factory in Tampa to Jacksonville, Florida for ocean shipment to Nigeria scheduled to occur on April 30, 1982. Despite Nu-Air's knowledge that no coverage was in effect, and despite advice allegedly from Intercredit not to ship without coverage, Nu-Air shipped its products to Dukans in Nigeria.

When notified of the FCIA action, Plaintiff advised Intercredit that it had no choice except to ship the entire order because the windows and doors could not be resold or otherwise disposed of without sustaining an enormous loss.

Plaintiff then shipped the entire order which was received by Dukans in July, 1982. Plaintiff made repeated demands for payment of the remaining balance of approximately $311,846. However, Dukans refused to pay.

Plaintiff, on April 11, 1983, filed a proof of claim with FCIA for the insured loss. FCIA, on May 18, 1983, rejected Plaintiff's claim, stating that Plaintiff's SBCL was declined prior to shipment and that no coverage existed under NU-Air's [sic] discretionary credit limit.

This action was filed on January 24, 1984, against Defendants seeking the recovery of $280,661.68, representing 90% of the unpaid account balance, plus interest, attorney's fees and costs.

DISCUSSION

Nu-Air had considerable prior experience in business dealings with Intercredit and FCIA. There are only two facts in dispute in this case, neither or which, however, can be material in light of the remaining facts which have been conceded and the well-established principles of law which must be applied to the undisputed facts. With regard to the narrow issue of whether FCIA approved Nu-Air's application for a Special Buyer Credit Limit, or so advised Intercredit, FCIA never approved Nu-Air's application for a Special Buyer Credit Limit to cover the Dukans transaction. The factual dispute as to whether FCIA ever advised Intercredit, or anyone else, that it had approved Nu-Air's SBCL

application, is immaterial since FCIA and Nu-Air never entered into an enforceable insurance contract regarding the SBCL.

However, it is significant that even if the trier of fact accepts Intercredit's assertion that FCIA advised Intercredit that FCIA had approved Nu-Air's SBCL, it is undisputed that, prior to Nu-Air's shipment of the goods from the United States on or about April 30, 1982, FCIA notified Intercredit, on March 19, 1982, and Nu-Air, that it was withdrawing the SBCL application, as permitted by the policy's terms. Even if this oral notice of withdrawal is disputed, the admitted facts demonstrate that Plaintiff received written notification April 12, 1982. The policy FCIA issued to Nu-Air provided Nu-Air with the option to protect itself against various pre-shipment risks, including pre-shipment withdrawal by FCIA. Although Nu-Air's broker, Intercredit, was aware that FCIA could, in fact, withdraw coverage, Nu-Air consciously chose not to select FCIA pre-shipment coverage.

Even if the trier of fact finds that FCIA, on March 3, 1982, advised Intercredit that FCIA had approved Nu-Air's SBCL, FCIA exercised its right to withdraw coverage without liability. If only the written withdrawal notification of April 12th is effective, and not the alleged oral withdrawal notification of March 19th, then the lack of written notification of SBCL coverage precludes there ever being such coverage. Finally, even if FCIA did not withdraw the SECL before Nu-Air's rights vested under the policy, Nu-Air still is barred from recovering under the policy because it is undisputed that Nu-Air failed to file with FCIA, in a timely fashion, various reports required by the policy, including notice of Dukans' default and Nu-Air's Proof of Loss Form. Plaintiff's filed claim February, 1985 [sic], five months later wherein the insurance policy presented a 90 day limit. Plaintiff's "proof of loss" states the shipping date as April 30th. Furthermore, Plaintiff paid the premium May 15th, wherein the policy requires payment within fifteen days of the shipment. If shipment were to be construed as before April 30th, then Nu-Air

clearly defaulted as to payment of premium. The insured's failure to comply with its obligation to file timely notices and proof of loss, bar the insured from recovery under the policy.

With regard to Nu-Air's negligence count, Intercredit never acted as FCIA's agent in connection with the Nu-Air transaction. Nu-Air designated Intercredit to act on Nu-Air's behalf as Nu-Air's broker; all parties considered Nu-Air to be Intercredit's client; Nu-Air authorized Intercredit to act on its behalf; and Intercredit had no authority to issue an FCIA policy, any endorsements to an FCIA policy, or approve an SBCL application. Thus, under well-established agency law, Intercredit was Nu-Air's agent and FCIA cannot be vicariously liable for Intercredit's acts.

Moreover, because it also is undisputed that FCIA acted at all times as an agent of the Export-Import Bank of the United States, an agency of the United States Government, FCIA, thus, is immune from Nu-Air's negligent misrepresentation claim by the doctrine of official immunity, which prohibits suits against government agents, including those in the private sector, for non-constitutional torts.

FCIA also cannot be held liable on Nu-Air's misrepresentation claim because Nu-Air's reliance, if any, on Intercredit's representation was, as a matter of law, unreasonable. Both Nu-Air and Intercredit were aware that the insurers' total liability under the policy issued to Nu-Air could not exceed $200,000; thus, neither Nu-Air nor its agent, Intercredit, acted reasonably, as a matter of law, when they both allegedly believed that FCIA had approved Nu-Air's request for the separate $371,530.49 SBCL. Furthermore, because Nu-Air, on its own or through its agent Intercredit, knew, or should have known, that it had the option to select pre-shipment coverage and knew, or should have known, that FCIA could withdraw coverage prior to Nu-Air's shipment of the goods from the United States without incurring any liability, Nu-Air did not rely reasonably on Intercredit's representations regarding FCIA approval of the Nu-Air SBCL. Nu-Air also cannot recover here because it failed to satisfy its common law and

contractual obligations to mitigate its damages when it proceeded with the sale to its Nigerian purchaser in the face of FCIA's clear and unequivocal declaration that it would not provide the requested coverage without making any effort to renegotiate with Dukans.

FINDINGS OF FACT

The statement of facts following is admitted by the parties in the pre-trial stipulation.

1. Plaintiff Nu-Air Manufacturing Co. ("Nu-Air") is a Florida corporation engaged in the business of assembling aluminum windows and doors. Its principal place of business is in Tampa, Florida.
2. Defendant Frank B. Hall & Co. ("Frank B. Hall") is a New York corporation engaged principally in the insurance brokerage business. Intercredit Agency ("Intercredit") is an unincorporated division of Frank B. Hall engaged in the brokerage of export credit insurance. Frank B. Hall and Intercredit each has its principal place of business in New York, N.Y. Intercredit brokers insurance policies issued by FCIA and by various other export credit insurance companies.
3. Defendant Foreign Credit Insurance Association ("FCIA") is an unincorporated association of insurance companies with its principal place of business in New York, N.Y.
4. The remaining defendants ("the Companies") are private insurance companies which are members of FCIA. None of the companies is incorporated in or has its principal place of business in Florida.
5. The Export-Import Bank of the United States ("Eximbank") is a United States government agency created by Act of Congress to provide, *inter alia*, export credit insurance to American exporters.
6. In 1961, with the express encouragement of Eximbank, FCIA was formed to act as Eximbank's agent in providing insurance protection against certain commercial and political risks to which United States exporters are exposed.

7. For over twenty years, pursuant to authority granted by 12 U.S.C. § 635(c)(2), Eximbank has entered into a series of agency agreements under which Eximbank continually has appointed and reappointed FCIA as Eximbank's agent in connection with the marketing, issuance, administration, and servicing of all export credit insurance policies issued by FCIA and Eximbank.

8. Under the agency agreement between FCIA and Eximbank, FCIA's authority in connection with the export credit insurance program is delegated to it by Eximbank and is subject to supervision and control of Eximbank officials.

9. Among other things, the agency agreement between Eximbank and FCIA specifically grants authority to FCIA to issue quotations and insurance policies on behalf of Eximbank; administer and service matters relating to such policies; collect all premiums for Eximbank for insurance issued by FCIA; and "take all other action which may be required under the circumstances in order to exercise the authority delegated to [FCIA]" under the agency agreement.

10. Under the FCIA-Eximbank agency agreement, Eximbank has authority over all significant decisions surrounding the issuance of export credit insurance. Eximbank also has the sole authority to determine the FCIA policy premium rates. Eximbank establishes premium rates at such levels that the insurance is widely available to United States exporters, both large and small.

11. In the fall of 1981, Nu-Air and Dukans Alliance International Co. ("Dukans") of Nigeria entered into negotiations for the sale by Nu-Air to Dukans of aluminum doors and windows.

12. On January 29, 1982, Nu-Air forwarded to Intercredit for submission to FCIA on Nu-Air's behalf an application for an FCIA export credit insurance policy requesting an aggregate limit of coverage under that policy of $50,000.

13. Nu-Air, on or about February 10, 1982, mailed to Intercredit for Intercredit to submit to FCIA on Nu-Air's behalf, a cover letter and an application for the issuance

of a Master Export Credit Insurance Policy and a Special Buyer Credit Limit, hereinafter referred to as "SBCL" in the amount of $65,000 for Dukans.

14. Nu-Air, on or about February 10, 1982, mailed another application to Intercredit for Intercredit to submit to FCIA on Nu-Air's behalf requesting FCIA's approval of a larger SBCL for Dukans insuring against the nonpayment by Dukans of the sum of $371,530.49, representing approximately one-half of the value of a proposed shipment of custom made aluminum windows and doors in the amount of $630,137.20 ordered by Dukans.

15. On or about February 17, 1982, Jane L. Ferry, Senior Vice President of Intercredit, processed Nu-Air's application for the SBCL for Dukans on Nu-Air's behalf in the amount of $371,530.49, and forwarded required reports, credit checks, and financial statements to FCIA, according to the letter.

16. On or about February 17, 1982, Intercredit submitted to FCIA, on behalf of Nu-Air, an application for an FCIA standard multibuyer export credit insurance policy (a "Master Policy").

17. On or about February 17, 1982, Intercredit submitted to FCIA on behalf of Nu-Air an application for an FCIA Special Buyer Credit Limit in the amount of $371,530.49 to cover that portion of the purchase price which Dukans allegedly would pay Nu-Air by sight draft.

18. An FCIA Special Buyer Credit Limit [SBCL] is an endorsement to an FCIA policy in which FCIA agrees, subject to certain terms and conditions, to insure a specific transaction otherwise outside the policy's coverage, either because the amount of the transaction exceeds the discretionary credit limit or the terms of the transaction are not otherwise permitted under the standard terms and conditions of the policy.

19. FCIA acted within the scope of the authority delegated to it by its agency agreement with Eximbank during the processing of Nu-Air's policy and SBCL applications.

20. John Healey is treasurer and comptroller of Nu-Air. He has been treasurer and comptroller of Nu-Air since 1979.

21. Healey had primary responsibility at Nu-Air for the procurement of FCIA export credit insurance.

22. Healey was the only person at Nu-Air who had contact with Intercredit regarding procurement of FCIA insurance coverage.

23. Prior to his employment with Nu-Air, Healey was treasurer of the Farrel Corporation in Ansonia, Connecticut.

24. As treasurer of Farrel, Healey participated in and became familiar with FCIA export credit insurance. In connection with his employment at Farrel, Healey had prior contact and involvement with Intercredit which had served as Farrel's broker in connection with Farrel's FCIA insurance policies.

25. In its application, Healey, on behalf of Nu-Air, designated Intercredit as Nu-Air's broker in connection with the procurement of FCIA export credit insurance.

26. Healey specifically requested that Intercredit act as Nu-Air's broker in connection with Nu-Air's application for an FCIA short-term Master Policy and an SBCL covering Nu-Air's proposed transaction with Dukans.

27. Nu-Air's understanding in March 1982 was that Intercredit had no authority to issue a policy quote on behalf of FCIA.

28. Nu-Air's understanding in March 1982 was that Intercredit had no authority to issue a policy on behalf of FCIA, or any endorsement thereto, including an SBCL.

29. In March and April, 1982, Intercredit's understanding was that it was representing Nu-Air in the procurement of export credit insurance from FCIA.

30. Intercredit never informed Nu-Air that Intercredit was in any way acting on behalf of FCIA.

31. Neither Healey nor anyone else at Nu-Air ever contacted FCIA directly regarding Nu-Air's acquisition of export credit insurance. All communications with FCIA by or on behalf of Nu-Air were made through its broker, Intercredit.

32. Nu-Air's application for an FCIA Master Policy was considered by FCIA's Marketing Department. Consideration by FCIA of an application for an FCIA Master Policy involves an evaluation by FCIA of the credit worthiness of the proposed Insured.

33. Nu-Air's application for an SBCL was considered by FCIA's Underwriting Department, which evaluates the creditworthiness of the proposed buyer.

34. FCIA's custom and practice in March 1982 was to consider a prospective customer's application for a Master Policy first, and then, if (1) FCIA issues a quotation to a prospective customer and (2) the prospective customer agrees to the terms and conditions of the quotation and submits the required premium check to FCIA, consider the customer's application for an SBCL, if any.

35. Jane Ferry was the employee at Intercredit primarily responsible for procuring FCIA export credit insurance for Nu-Air.

36. Ferry is Senior Vice President of Intercredit. She has been an employee of Intercredit for 25 years. For over 6 years, she has been responsible for procuring export credit insurance for Intercredit clients.

37. Ferry knew on March 3, 1982 that FCIA's Underwriting Department was responsible for approving all SBCL applications. Ferry also knew that FCIA's Marketing Department had no responsibility for the approval of SBCL applications.

38. Intercredit's custom and practice in March 1982 was to deal only with FCIA's Marketing Department regarding matters relating to the issuance of a Master Policy.

39. Intercredit's custom and practice in March 1982 was to deal only with FCIA's Underwriting Department regarding matters relating to the issuance of an SBCL.

40. Paul Garrigue is President of Intercredit and a member of the board of directors of Frank B. Hall. He has been with Intercredit since 1959.

41. Garrigue understood in March 1982 that FCIA's custom and practice was to consider a Master Policy application first and, upon issuance of the quotation and

acceptance by the customer, then to consider an SBCL application.

42. Both Nu-Air and Intercredit understood as of March 3, 1982 that an FCIA policy's aggregate limit was the total or maximum liability of the insurers thereunder. Nu-Air assumed as of that date that the aggregate limit under its proposed FCIA policy would be increased to an amount at least equal to the size of the SBCL Nu-Air was seeking.

43. Article V of the Policy provides as follows:

> "The Insurer shall not be liable for any loss;
>
> * * *
>
> J. Under Coverage A-Commercial Credit Risks . . . for which written claim is not made, on the Proof of Loss Form prescribed by the Insurer within eight months from the date of default."

44. FCIA's custom and practice in March 1982 was to inform the prospective insured's broker verbally of the material terms of a policy quotation, including, among other things, the discretionary credit limit, the aggregate limit of liability, the premium rate, and any special terms or conditions and, thereafter, to send to the prospective insured's broker a written quotation.

45. Intercredit has never had any authority to issue policy quotations on behalf of FCIA, approve policy applications for FCIA insurance, or approve applications for SBCL's under FCIA policies.

46. Michele Milone in March 1982 was a sales representative in FCIA's Marketing Department. She began her employment at FCIA in 1979.

47. Michele Milone was the sales representative at FCIA responsible for processing Nu-Air's application for a Master Policy. Ms. Milone had no authority to approve the issuance of a policy quotation. Ms. Milone also had no authority whatsoever with regard to the processing of an SBCL application.

48. On or about March 3, 1982, Milone notified Ferry by telephone that FCIA intended to issue to Nu-Air a quotation for an FCIA Master Policy.

49. In March 1982, Intercredit's custom and practice when it was advised by FCIA that FCIA would issue a quotation for an FCIA policy was to ask FCIA about any special terms and conditions which FICA intended to include in the quotation, including, among other things, aggregate limit of liability, discretionary credit limit and premium rate.

50. In their March 3, 1982 telephone conversation, Milone informed Ferry of the material terms that would be included in FCIA's quote for Nu-Air's proposed policy, including the premium rate, discretionary credit limit, and aggregate limit of liability.

51. In their March 3, 1982 telephone conversation, Ms. Milone advised Ms. Ferry that the quote FCIA would issue to Nu-Air would include the following terms:

    a. A $20,000 discretionary credit limit.

    b. A $200,000 aggregate credit limit.

    c. A premium rate of $1 per $100 of coverage.

52. In March 1982, FCIA's custom and practice was to have a representative of FCIA's Underwriting Department inform brokers or insureds of FCIA's final decision on an SBCL application.

53. On March 3, 1982, Intercredit advised Nu-Air that FCIA would issue a quotation for a Master Policy. Intercredit on March 3, 1982 also informed Nu-Air that its SBCL application under the Master Policy had been approved.

54. Nu-Air, upon receiving notification from Intercredit that the SBCL for Dukans had been approved by FCIA, on or about March 3, 1982, advised Dukans of FCIA's approval, and based on Nu-Air's understanding that FCIA had approved the SBCL, accepted the order for custom made aluminum windows and doors in the amount of $630,137.20 from Dukans; payable one-half by letter of credit, and the remaining one-half by sight draft.

55. Nu-Air immediately proceeded to assemble the aforedescribed order for Dukans and started shipping containers of finished windows and doors to the Port of Jacksonville, Florida, on March 16, 1982. Subsequent

containers of materials were shipped to Jacksonville on March 18, 1982, March 22, 1982, March 26, 1982 (2 containers), April 1, 1982, April 5, 1982, April 7, 1982, April 14, 1982 (2 containers), April 20, 1982 and April 26, 1982.

56. On March 3, 1982, Healey requested that Ferry ask FCIA to reconsider its quoted premium rate.

57. On or about March 3, 1982, Ferry, pursuant to instructions from Nu-Air, requested that FCIA reconsider its quotation regarding the premium rate set forth on the policy quote.

58. On March 3, 1982, Intercredit understood that FCIA had the right, under the terms of Nu-Air's Master Policy, to cancel an SBCL without any coverage responsibility prior to shipment of the merchandise unless the insured had selected pre-shipment coverage.

59. On March 3, 1982, Ferry understood that the aggregate policy limit was the total liability of the insurer.

60. On March 3, 1982, Ferry understood that, without an increase by FCIA in the aggregate limit of Nu-Air's Master Policy, Nu-Air's coverage under its policy would not exceed $200,000.

61. The amount of coverage which Nu-Air requested on its SBCL application exceeded the amount of the aggregate credit limit in Nu-Air's Master Policy.

62. FCIA refused Intercredit's request to lower the premium rate which it had quoted to Intercredit for Nu-Air's Master Policy.

63. On or about March 4, 1982, FCIA forwarded to Intercredit a written quote for Nu-Air's proposed Master Policy, which included an aggregate policy limit of $200,000.

64. In March 1982, Healey understood that FCIA's custom and practice was to issue written documentation evidencing approval of an insurance application and an SBCL application.

65. Neither Nu-Air nor Intercredit ever applied to FCIA for an increase in the Nu-Air policy aggregate limit. FCIA never approved an increase in the aggregate limit set forth in the Nu-Air Master Policy. FCIA never told

anyone at Nu-Air or Intercredit that it would increase the aggregate limit above $200,000.

66. On March 5, 1982, Intercredit forwarded to Nu-Air a copy of FCIA's quote for a Master Policy for Nu-Air.

67. On or about March 10, 1982, Nu-Air received FCIA's policy quotation from Intercredit.

68. On or about March 10, 1982, Healey reviewed the quotation for a Master Policy which he received from FCIA.

69. At the time Healey reviewed the policy quotation, he was aware that the proposed policy's aggregate limit was $200,000.

70. On or about March 10, 1982, Healey, on behalf of Nu-Air, signed FCIA's quote for a Master Policy and forwarded it to Intercredit for transmittal to FCIA.

71. On or about March 10, 1982, Nu-Air submitted to Intercredit for transmittal to FCIA a check payable to FCIA in the amount of $500.00 as a premium deposit in connection with the policy's issuance.

72. Intercredit, on behalf of Nu-Air, forwarded to FCIA both the quote for a Master Policy which Nu-Air had executed and Nu-Air's $500.00 premium deposit.

73. On March 16, 1982, Intercredit submitted to FCIA a Dunn & Bradstreet report on Dukans in support of Nu-Air's SBCL application.

74. Healey understood as of March 1982, that FCIA reserved the right to withdraw or cancel the Master Policy or an SBCL at any time.

75. Healey understood in March 1982 that FCIA, in its quote to Nu-Air for a Master Policy, offered Nu-Air the opportunity to select pre-shipment insurance coverage for its transaction.

76. FCIA's pre-shipment insurance coverage, subject to its terms and its conditions, protects the insured, among other things, against FCIA's withdrawal of an SBCL prior to shipment from the United States.

77. Nu-Air elected not to purchase pre-shipment coverage in connection with the Dukans transaction because Mr. Healey deemed Nu-Air's pre-shipment risks to be small.

78. On or about March 24, 1982, Nu-Air received the FCIA Master Policy with Declarations and Endorsements. The policy did not include an SBCL endorsement.

79. The Declarations portion of Nu-Air's Master Policy contains in Item No. 3 a $20,000 discretionary credit limit. Under the policy, the Insured is authorized to enter into transactions not exceeding the amount of the discretionary credit limit pursuant to such terms as are required by the policy.

80. Item No. 7 of the Declarations in Nu-Air's Master Policy provides for a $200,000 aggregate limit of liability under the Master Policy. Article IV.C. of Nu-Air's Master Policy, which is specifically incorporated by reference in Item No. 7 of the Declarations, provides in pertinent part: "[T]he total liability of the Insurers under this policy shall not exceed the aggregate limit authorized in the Declarations." Article XI.B. of the policy provides, inter alia: "Issuance by the Insurers of notification of a Special Buyer Credit Limit shall, as of its effective date, operate to replace the Discretionary Credit Limit pertaining to *insured transactions* thereafter made to the buyer designated in the notification of a Special Buyer Credit Limit."

81. The terms of the Master Policy which FCIA, on or about March 19, 1982, issued to Nu-Air included, among other things:

    a. A discretionary credit limit of $20,000 subject to certain conditions.

    b. An aggregate limit of $200,000.

    c. A premium rate of one dollar per $100 of coverage.

82. Nu-Air's application for an SBCL in the amount of $371,530.49 exceeded the aggregate limit of the Master Policy which FCIA issued to Nu-Air.

83. Article XI.B. of Nu-Air's Master Policy provides, inter alia:

> The Insurers shall have the right at any time to add to, delete, or amend any limitation, condition, or credit limit including the right to withdraw coverage with respect to any country or buyer . . . Any

change, whether by endorsement or otherwise, shall apply only to transactions which would otherwise be *insured transactions* made on or after the effective date of such change.

84. Mohammed Aslam is a financial analyst in FCIA's Underwriting Department. He has been employed at FCIA since 1971. His duties include conducting the buyer analysis involved in processing SBCL applications.

85. Smeraldo Torchia is Assistant Vice President of Intercredit. He has been employed at Intercredit since 1981. Prior to that time, he worked at FCIA as an underwriter.

86. On or about March 17, 1982, FCIA's Underwriting Department received and logged in Nu-Air's SBCL application.

87. On or about March 19, 1982, Aslam processed Nu-Air's SBCL application.

88. On or about March 19, 1982, Aslam concluded that Nu-Air's application should be withdrawn because of his understanding that there was a Nigerian government ban on imports.

89. On or about March 19, 1982, Aslam verbally informed Torchia of Intercredit that FCIA was withdrawing Nu-Air's SBCL application.

90. Intercredit's custom and practice in March 1982, was to inform a client immediately upon receipt of any written or verbal information from FCIA regarding withdrawal or cancellation of the client's SBCL.

91. Torchia's custom and practice in March 1982 was to communicate to the client immediately any information which he received from an insurance company regarding the client's application or policy.

92. Torchia advised Aslam on or about March 11, 1982 that he (Torchia) would notify Nu-Air that FCIA had rejected Nu-Air's SBCL application.

93. On April 2, 1982, FCIA issued written notification to Nu-Air and Intercredit that Nu-Air's application for an SBCL was considered withdrawn because of import restrictions imposed by the Nigerian government.

94. Following receipt of written notification from FCIA that Nu-Air's SBCL application had been withdrawn, Intercredit asked FCIA to review Nu-Air's application.

95. On or about April 12, 1982, Nu-Air received FCIA's written notification that Nu-Air's SBCL application had been withdrawn.

96. Nu-Air telephoned Intercredit immediately upon getting the notice of rejection from FCIA and advised Intercredit that (a) the order for custom made windows from Dukans was accepted solely on the strength of FCIA's approval of Nu-Air's SBCL application for Dukans, insuring approximately one-half of the value of the order; (b) Dukans had been advised by Nu-Air on or about March 3, 1982, that the order for custom made aluminum windows and doors in the amount of $630,137.20 was accepted and would be fabricated, placed in containers and loaded for shipment on or about April 30, 1982, to Nigeria; (c) the payment terms of the order were 50% letter of credit and 50% sight draft, with the FCIA credit insurance covering the sight draft part of the order, and that Nu-Air had to ship the entire order in the amount of $630,137.20 in order to collect the 50% portion of the sale covered by the letter of credit; (d) a substantial part of the order had already been manufactured, and 8 containers out of a total of 12 had already been transported to Jacksonville, Florida, where arrangements had been made to ship the material on the "Seki Rolette" vessel on or about April 30, 1982; and (e) the order was custom made to Dukans' specifications and had little salvage value.

97. On or about April 12, 1982, Ferry verbally asked FCIA to reconsider Nu-Air's SBCL application because Nu-Air had satisfied Nigerian import requirements.

98. On April 12, 1982 Ferry told Healey that she was already aware of FCIA's refusal to issue an SBCL to cover the Nu-Air sale to Dukans.

99. On or about April 12, 1982, Ferry informed Nu-Air that any shipments which Nu-Air made to Dukans would not be covered by FCIA insurance.

100. On or about April 12, 1982, in response to Ferry's request that FCIA review Nu-Air's SBCL application, FCIA reviewed its underwriting analysis of Dukans.

101. On or about April 13, 1982, FCIA verbally informed Intercredit of its decision to reject Nu-Air's SBCL application.

102. On or about April 15, 1982, FCIA Underwriting Manager, Eric Krauss, sent Ferry a written explanation regarding FCIA's denial of Nu-Air's SBCL's application for its transaction with Dukans.

103. Between April 12 and April 30, 1982, Ferry and Healey had at least one conversation in which Ferry advised Healey of Ferry's position that Nu-Air did not have coverage for its transaction with Dukans, that FCIA had the right to withdraw coverage prior to shipment from the United States and that Nu-Air should not ship to Dukans.

104. Nu-Air, on or about April 30, 1982, shipped from the United States the goods that it had sold to Dukans.

105. Nu-Air, on May 11, 1982, wrote Intercredit that the complete order for Dukans was completed and loaded on April 30, 1982, which was within the time frame of the original Form M (Import Permit). Nu-Air further advised Intercredit that payment of the premium due for this shipment would be made on the statement due May 15, 1982.

106. On or about May 18, 1982, Nu-Air forwarded FCIA its check in the amount of $3,128.15, along with a shipping report which included the aforedescribed Dukans shipment insuring the amount of $311,910.00.

107. Dukans, on or about July 13, 1982, advised Nu-Air by letter that the aforedescribed shipment arrived and the material was in good order.

108. Prior to September 1984, Healey never saw the April 15, 1982 letter from Krauss to Ferry.

109. The sight drafts issued by Dukans to pay for 50% of its order from Nu-Air became due no earlier than August 2, 1982, but no later than August 15, 1982. Dukans' failure to make payment to Nu-Air by the August 1982

due date of the sight drafts constituted a default under the FCIA Master Policy.

110. Nu-Air, on or about August 24, 1982, cabled Dukans requesting the status of the sight drafts and on September 15, 1982, requested payment of the sight drafts, which were due no earlier than August 2, 1982, but no later than August 15, 1982. Nu-Air thereafter made numerous demands for payment from Dukans, who repeatedly promised to pay Nu-Air, but failed to do so.

111. On or about April 11, 1983, Nu-Air mailed to FCIA a Notice of Claim and Proof of Loss form alleging that Dukans had failed to make payment under the sight draft for the windows and doors Nu-Air had shipped to Dukans, which documents FCIA received April 18, 1983.

112. In its Notice of Claim and Proof of Loss form, Nu-Air alleged that Dukans owed $311,846.32 to Nu-Air stemming from Dukans' default on its sight drafts.

113. On or about May 18, 1983, FCIA denied Nu-Air's claim.

114. The phrase "insured transaction" is defined in Article III of Nu-Air's Master Policy, in pertinent part, as "a sale or sales approved by the Insurers on the conditions specified in the declarations, provided the products sold are: 1. shipped from the United States during the policy period specified in the declarations such shipment to begin when the products in question are placed en route to the buyer on the order of the Insured or any of its agents."

115. The sales contract entered into by Nu-Air and Dukans does not mention Nu-Air's acquisition of FCIA export credit insurance as a condition of the sale.

116. Nu-Air and Dukans never entered into any written agreement that a condition of the sale of aluminum windows and doors to Dukans was conditioned upon Nu-Air's receipt of FCIA export credit insurance.

117. The cost of the raw materials required to manufacture the Dukans order equalled approximately 60% of the purchase price.

118. The cost of the labor required to manufacture the Dukans order equalled approximately 10% of the purchase price.

119. Nu-Air made no effort to sell the goods manufactured for the Dukans order to another purchaser after Intercredit informed Healey that FCIA had withdrawn its SBCL policy application.

120. Nu-Air at the time it received cancellation of the coverage from FCIA: (a) had finished manufacturing a substantial portion of the aforedescribed order and had already shipped 8 out of the total 12 containers to the Port of Jacksonville, Florida; and (b) would have lost the opportunity of receiving the sum of $318,290.88, which represented that part of the order secured by Letters of Credit if the order was not shipped.

121. Nu-Air never attempted to renegotiate its sales agreement with Dukans after it received notification that FCIA had withdrawn Nu-Air's SBCL application.

122. Nu-Air's custom and practice in March 1982 was to order raw materials automatically when inventory dropped below a set level for each item.

123. Nu-Air, both prior to and subsequent to March 4, 1982, made purchases of the same raw materials which it used in connection with the Dukans order.

124. All of the products which Nu-Air sold to Dukans are listed in Nu-Air's product catalogue, and were sold in 1982 in the normal course of Nu-Air's business.

125. Subsequent to Nu-Air's sale to Dukans, Nu-Air received orders for windows and doors identical to some of those which were involved in the Dukans transaction.

126. Nu-Air's Master Policy provides in Article VI.F that the Insured agrees "to use all reasonable measures to prevent or minimize *loss* hereunder and take all reasonable steps to effect *recoveries*" [emphasis in original].

127. Dukans in February 1984 made payments against four of its drafts by depositing Nigerian currency equivalent at the time to $101,566.51 in Nu-Air's account at Nu-Air's Nigerian correspondent bank.

128. Dukans informed Nu-Air in March 1984 that it had made payment in Nigerian currency to Nu-Air against

four additional drafts by depositing the monies in Nu-Air's account at Nu-Air's Nigerian correspondent bank.

129. First National Bank of Florida has informed Nu-Air that Nigerian currency covering eight of the invoices involved in the Dukans sale has been deposited in a Nigerian bank.

130. Article VI.C. of the Master Policy provides:

> The insured agrees:
>
> * * *
>
> B. to notify the Insurers in writing, within 15 calendar days of actual knowledge thereof, of financial difficulty of any buyer rendered an *insured transaction*, or of the occurrence of any risks enumerated in Article II hereof likely to cause a *loss* hereunder with respect to such buyer. [Emphasis in original and indicates terms defined elsewhere in the policy.]

131. Until Nu-Air filed in February 1983 its Overdue Accounts Report for January 1983, Nu-Air had not notified FCIA that Dukans had defaulted in August 1982 on Dukans [sic] obligation under the sight drafts.

132. Article V.D. of Nu-Air's Master Policy provides that the insured agrees:

> D. To record on the Overdue Accounts Report Form all amounts due the Insured from buyers which at the end of the previous month were wholly or partly unpaid for more than 90 days from the *due date* (whether or not previously reported as overdue) and to record each month thereafter all amounts which continue to be wholly or partly unpaid, unless and until a claim is filed in connection with such unpaid amounts [Emphasis in original.]

133. Nu-Air reported to FCIA Dukans' default on the sight drafts in Nu-Air's Overdue Accounts Report dated February 12, 1983 covering the reporting period for January 1983.

134. Article VI. of the policy provides, *inter alia*, that

> "The Insured agrees;
>
> E. to use all reasonable measures to prevent or minimize *loss* hereunder and take all reasonable

steps to effect *recoveries* including, if required by and at the expense of the Insurers (subject to the provision of Article X), enforcement of any security and institution of legal proceedings in the name of the Insured against either the buyer or any guarantor or both."

135. Article XI. provides as follows:

"I. Compliance by Insured

Failure by the Insured to comply with any term or condition of this policy shall not be deemed to have been excused or accepted by the Insurers unless the same is specifically so excused or accepted by an officer of the Insurer in writing."

136. Nu-Air was compelled to and did employ David Hyman, P.A., to institute this action to collect $280,661.68 plus interest, costs and attorney's fees for said loss and has agreed to pay its attorney a reasonable fee for said services.

137. Article VI. of the policy provides, *inter alia*, that

"The Insured agrees:

A. to pay the premiums in the amounts specified in the declarations in accordance with the terms set forth therein;"

138. Article XI.C.1. of Nu-Air's policy provides that,

"The Insured shall declare the gross *invoice value* of all shipments under *insured transactions* on the applicable report form provided by the Insurers and shall submit the premium for such shipments on or before the 15th day of the month following each reporting period. The Insured agrees to submit such report form even if no shipments under *insured transactions* are made during any reporting period." [Emphasis in original.]

139. Item No. 8.3 of Nu-Air's policy provides,

"The Insured shall declare the *gross invoice value* of all shipments under *insured transactions* on the applicable report form provided by the Insurers and shall submit the premium for such shipments on or

before the 15th day of the month following each reporting period. The Insured agrees to submit such report form even if no shipments under *insured transactions* are made during any reporting period." [Emphasis in original.]

140. Item No. 9 of Nu-Air's policy provides,

"All shipments of all products stated in the application made a part hereof which qualify as *insured transactions* shall be declared and the appropriate premium paid thereon." [Emphasis in original.]

141. Article V. of the policy provides that,

"The Insureds shall not be liable for any loss:

* * *

L. if the Insured has failed to compy with any term and condition of the Application, Declarations or Policy including Endorsements and Special Conditions;"

142. Article XI.J. of the policy provides that,

"1. If the Insured fails to file any shipment report, to declare any shipment, or to pay any premium when due, the Insurers may at their option:

a) terminate the policy as of the date such shipment report, or declaration, or premium payment was due by giving the Insured written notice of such termination; or

b) continue the policy in force for the remainder of the policy period, or any part thereof and hold the Insured liable for payment of premium to the end of the policy period or to any earlier date elected by the Insurers."

143. Article IV.B. of the policy provides that,

"B. The amount of the credit limit for any particular buyer shall be:

1. The amount of the Discretionary Credit Limit authorized in the declarations; or

2. such other amount as the Insurers shall approve by written notification to the Insured of a Special Buyer Credit Limit."

CONCLUSIONS OF LAW

A) Whether or not FCIA advised Intercredit, on March 3, 1982, orally, that FCIA had approved Nu-Air's application for an SBCL, and/or orally advised said parties of the withdrawal of the alleged coverage prior to the written notification of April 12, 1982, the clear language of the policy enabled FCIA to withdraw said coverage. Furthermore, the explicit requirements for written notification preclude this Court's holding that the SBCL was approved.

B) FCIA's liability under the policy it issued to Nu-Air, in the event of non-payment by Dukans, did not accrue prior to FCIA's withdrawal of coverage for the Dukans transaction.

C) Nu-Air did not have coverage under its policy for the eight containers shipped to Jacksonville prior to April 12, 1982, or thereafter.

D) Nu-Air's reliance on Intercredit's alleged March 3, 1982 statement that FCIA had approved Nu-Air's application for an SBCL was not reasonable where Nu-Air knew that FCIA's aggregate limit of liability under the policy was $200,000.

E) Assuming FCIA advised Intercredit on or about March 3, 1982, that FCIA had apprpved [sic] Nu-Air's application for an SBCL for the Dukans transaction, Intercredit's reliance on FCIA's statement was not reasonable where Intercredit was aware that the policy's aggregate limit was $200,000.

F) Nu-Air's failure, until February 1983, to report to FCIA Dukans' default on an FCIA Overdue Accounts Report, or otherwise, bars Nu-Air from recovering against FCIA under the policy where Nu-Air was aware on or about August 31, 1982, that Dukans had defaulted on its obligation to make payment to Nu-Air on the sight drafts, no earlier than August 2, 1982, but no later than August 15, 1982.

G) FCIA was acting within its authority as the agent of the Export-Import Bank of the United States, and is immune from suit under Nu-Air's negligent misrepresentation claim.

H)Nu-Air's failure to mail, prior to April 11, 1983, a Proof of Loss/Notice of Claim form, which FCIA received on April 18, 1983, bars Nu-Air's recovery here.

I) Intercredit had no authority to secure or maintain export credit insurance. It clearly had authority to act only as Nu-Air's broker.

J) Even if Intercredit did orally advise Nu-Air that said SBCL would be approved, said representation would not be negligent where Nu-Air received oral notification of policy limits so as to negate said coverage, and said policy clearly did not provide such coverage and clearly contained a provise [sic] to withdraw said coverage prior to shipment, and Nu-Air clearly elected not to have pre-shipment coverage.

Accordingly, it is

ORDERED that the motions for summary judgment be, and hereby are, granted. The Clerk of this Court is directed to enter judgment in accord with this Order; entering judgment in favor of FCIA and Intercredit, and against Nu-Air. The motion to strike is rendered moot by this determination.

DONE and ORDERED in Chambers, in Tampa, Florida, this 20th day of December, 1985.

.....

ELIZABETH A.
KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

Rule 28.1 List

The following is a list of the member companies of FCIA, named defendants herein, during the time period relevant to this dispute.

Aetna Casualty and Surety Co., Inc.
Aetna Insurance Co.
American Home Insurance Co.
American Mutual Liberty Insurance Co.
Atlantic Mutual Insurance Co.
Commercial Union Insurance Co.
Continental Casualty Co.
The Continental Insurance Company
Employers Mutual Insurance Co. of Wisconsin
Federal Insurance Co.
Fireman's Fund Insurance Co.
The Hanover Insurance Co.
Hartford Accident and Indemnity Co.
The Home Insurance Co.
Insurance Co. of North America
Liberty Mutual Insurance Co.
Lumbermens Mutual Casualty Co.
Reliance Insurance Co.
Royal Indemnity Co.

87-1070

Supreme Court, U.S.
FILED
MAR 3 1988
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

FOREIGN CREDIT INSURANCE ASSOCIATION,

Petitioner,

v.

NU-AIR MANUFACTURING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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33 pp

QUESTIONS PRESENTED

1. Whether a private sector export insurer, acting as the sole insurer of commercial credit risk, is immune from suit for negligent misrepresentations it makes to its commercial credit risk customer.

2. Whether established principles of waiver and estoppel apply to a customer's ordinary contract suit against a private sector export insurer of commercial credit risk.

LIST OF PARTIES AND RULE 28.1 LIST

Respondent Nu-Air Manufacturing Company ("Nu-Air") has no parent companies, subsidiaries, or affiliates to list within the meaning of Rule 28.1.

Pursuant to Rules 22.1 and 34.2, however, Nu-Air opposes the Foreign Credit Import Association's ("FCIA's") statement of "Parties to the Proceeding and Rule 28.1 List" in that it presents as a fact what is in reality an incorrect and argumentative assertion. Specifically, FCIA contends that under an agreement between it and the Export-Import Bank ("Eximbank"), FCIA's "members have no financial interest in the outcome of this case." Pet. p. ii. This seemingly benign remark, gratuitously inserted by FCIA in the ostensibly neutral introductory section of its petition, is really a legal argument that is integral to the new rule FCIA hopes this Court will adopt on the merits.[1] As this response demonstrates, this precise argument has been uniformly and categorically rejected by both of the Circuits that have considered it. In any event, FCIA's attempt to subtlely advance its legal position outside of the argument section of its petition under the guise of merely identifying the parties is inappropriate, and Nu-Air opposes it.

1/ FCIA's argument is that because in 1983 it entered into an agreement under which it has the ability to seek reimbursement from Eximbank for certain federal export insurance claims, Nu-Air's suit is effectively against Eximbank and the federal government. From this flawed premise, which has never been accepted by any federal appeals court, springs FCIA's self-serving conclusion that its members are not "financially interested" in this proceeding. Pet. pp. 3, 11, 12, 16.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 28.1 LIST	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. Statement of the Facts	2
B. Opinions Below	5
1. The District Court's Order	6
2. The Eleventh Circuit's Decision	6
REASONS FOR DENYING THE WRIT	8
I. The Eleventh Circuit's Decision Does Not Conflict With Any Other Federal Appellate Decision Holding FCIA Immune From Suit In Tort	9
A. The Eleventh Circuit's decision does not conflict with the decisions of the Eighth and Ninth Circuits.	9
B. The Eleventh Circuit's decision does not present any reviewable holding regarding the immunity of Eximbank	14
II. The Eleventh Circuit's Decision Does Not Conflict With Any Other Federal Appellate Decisions Holding General Contract Principles of Waiver and Estoppel Do Not Apply To FCIA.	16

III. The Eleventh Circuit's Decision That FCIA Is Subject To Ordinary Contract Principles Of Waiver And Estoppel And To Suit In Tort Does Not Present Any Important Questions Of Federal Law That Should Be Settled By The Supreme Court. 19

A. FCIA's *Clearfield Trust* argument is not properly before this Court. 19

B. The Eleventh Circuit's decisic n is not inconsistent with *Clearfield Trust*. 21

C. The Eleventh Circuit's decision does not present any reviewable holding regarding application of the federal common law to Eximbank. 23

D. The Eleventh Circuit's decision will neither undermine federal insurance programs nor reduce exports by U.S. Companies. 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

Anderson v. Occidental Life Insurance Company,
727 F. 2d 855 (9th Cir. 1984) 9
Atlas Pallet, Inc. v. Gallagher,
725 F.2d 131 (1st Cir. 1984) 16
Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335,
3 L.Ed.2d 1434 (1959) 11, 12
Beverly v. Macy,
702 F.2d 931 (11th Cir. 1983) 16
Bonner v. City of Prichard, Alabama,
661 F. 2d 1206 (11th Cir. 1981) (en banc) 12
Brady v. Roosevelt Steamship Company,
317 U.S. 575, 63 S.Ct. 425, 87 L.Ed. 471 (1943) .. 13
Brazil v. Giuffrida,
763 F.2d 1072 (9th Cir. 1985) 16
Bushman v. Seiler,
755 F. 2d 653 (8th Cir. 1985) 9, 12
Butz v. Economou,
438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed. 895 (1978). 11
Clearfield Trust Company v. United States,
318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943) .. 7, 19
Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012,
82 L.Ed.2d 139 (1984) 13
Delta Air Lines, Inc. v. August, 450 U.S. 346,
101 S.Ct. 1146, 67 L.Ed.2d 287 (1981) 20
Doe v. McMillan, 412 U.S. 306, 93 S.Ct. 2018,
36 L.Ed.2d 912 (1973) 12
Federal Crop Insurance Corp. v. Merrill,
332 U.S. 380, 68 S. Ct. 1, 92 L.Ed. 10 (1947) 20, 21
Foster v. Day & Zimmermann,
502 F. 2d 867 (8th Cir. 1974) 13
Franchise Tax Board of California v. United States Postal Service, 467 U.S. 512, 104 S.Ct. 2549,
81 L.Ed.2d 446 (1984) 13, 15
Gensplit Finance Corp. v. FCIA,
616 F. Supp. 1504, 1507 (D.C. Wis. (1985) 14
Hamilton Bank v. Export-Import Bank,
634 F. Supp. 195 (E. D. Pa. 1986) 11
Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727,
73 L.Ed.2d 396 (1982) 11, 12
Keifer & Keifer v. Reconstruction Finance Corporation,
306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784 (1939) .. 14

Lovell Manufacturing v. Export-Import Bank of the United States, 777 F. 2d 894 (3d Cir. 1985) 8, 10, 17
Matranga v. Travelers Insurance Company, 563 F. 2d 677 (5th Cir. 1977) 12
Miree v. Dekalb County, Georgia, 433 U.S. 25, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977) 19
Nu-Air Manufacturing Co. v. Frank B. Hall & Company of New York, 822 F. 2d 987 (11th Cir. 1987) ...*Passim.*
Peterson v. Weinberger, 508 F. 2d 45 (5th Cir.), *cert. denied*, 423 U.S. 830 (1975) 12
Rochester Methodist Hospital v. Travelers Insurance Company, 728 F. 2d 1006 (8th Cir. 1984) 13
Sommerville v. United States, 376 U.S. 909 84 S.Ct. 663, 11 L.Ed.2d 608 (1964) 22
United States v. Allegheny County, Pa., 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209 (1944) 7, 20
United States v. Asmar, 827 F.2d 907 (3rd Cr. 1987) 21
United States v. Parish of St. Bernard, 756 F.2d 1116 (5th Cir. 1985), *cert. denied*, 474 U.S. 1070 (1986) 16
United States v. Seckinger, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970) 7, 20
West v. Harris, 573 F.2d 873 (5th Cir. 1978), *cert. denied*, 99 S.Ct. 1424, 440 U.S. 946 (1979) .. 16
Westfall v. Erwin, 484 U.S. _____, 108 S.Ct. 580, 98 L.Ed.2d _____ (1988) 12

87-1070

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

FOREIGN CREDIT INSURANCE ASSOCIATION,

Petitioner,

v.

NU-AIR MANUFACTURING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The section of FCIA's petition labeled "Statement of the Case" bears little resemblance to the actual determinative facts and issues on which the Eleventh Circuit based its thorough and well reasoned decision in this summary judgment appeal. Over one-half of FCIA's Statement is in reality a summary of argument coupled with a self-serving running commentary, without record references, on its view of its relationship to two entities not even before the Court, the federal government and Eximbank. Pet. pp. 3-5. All but lost are the core facts on which the Eleventh Circuit's decision actually turned. These facts, which are plainly

stated and readily available in the Court of Appeal's comprehensive twelve page published decision, *Nu-Air Manufacturing Co. v. Frank B. Hall & Company of New York,* 822 F. 2d 987 (11th Cir. 1987), are incorporated by reference.

That there is no basis for this Court to grant discretionary review in this case emerges despite FCIA's recasting of the pertinent facts and issues. Because of FCIA's strategy, however, the following opposing statement of the case is presented to clarify the record and correct the inaccuracies and omissions in FCIA's version. Rules 22.1, 34.2.

A. Statement of the Facts

Respondent Nu-Air Manufacturing Company is a Florida corporation engaged in the business of assembling aluminum goods. *Nu-Air Manufacturing Co.,* 822 F. 2d at 989. Petitioner FCIA is an association of private insurance companies that was established in 1961 at the encouragement of the Eximbank. *Nu-Air,* 822 F. at 989, n. 2. It issues insurance on behalf of the Eximbank, a federal agency. *Id.* at 994. FCIA's nineteen members, which include Aetna, Continental, Fireman's Fund, Hartford, and Liberty Mutual, are among the very largest insurance companies. Pet. p. 51a.

Nu-Air filed this diversity action in the Middle District of Florida against Intercredit Agency, its insurance broker, and FCIA, its export insurer.[2] This tort and contract suit was based on FCIA's denial of Nu-Air's $311,846.32 insurance claim. Nu-Air had made the claim under its export credit insurance policy for a loss incurred when a Nigerian buyer failed to pay for custom made aluminum doors and windows. *Id.* at 989-90.

2/ Although required by Rule 21.1(i), FCIA's petition does not show the basis for federal jurisdiction in the district court. Significantly, jurisdiction in this case was founded on diversity of citizenship under 28 U.S.C.A. § 1332, *not* on the existence of any federal question.

Against this background, the importance of correcting FCIA's inaccuracies and omissions is better understood. Had it fully and fairly depicted the record, FCIA would have been forced to acknowledge the bad facts from which it now seeks insulation by attempting to stretch inapplicable principles of governmental immunity and suspend the application of well settled rules of waiver and estoppel. In its futile attempt to make this ordinary insurance coverage dispute appear certworthy, FCIA has failed to mention a number of the unfavorable facts that help show both why this case does not qualify for review and why the result reached in the Eleventh Circuit was fair and just:

1. Under the specific terms of the policy involved in this case, the Eleventh Circuit recognized and FCIA conceded that FCIA was the exclusive insurer of "commercial risks," while Eximbank insured only "political risks." *Nu-Air,* 822 F. 2d at 994; Pet. brief p. 3. Since Nu-Air's claim was only under the commercial risk provision of its policy, FCIA was the sole insurer for the claim in issue. *Id.* Indeed, neither Eximbank nor the federal government is a defendant or even a party to this proceeding.[3/]

2. It was not merely "understood" by Nu-Air that it needed the SBCL to cover the Nigerian sale. Pet. p. 5. Instead, the parties stipulated and the Eleventh Circuit acknowledged that it was only because Nu-Air was actually told that the requested coverage was

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3/ As noted, in 1983, the year before the occurrence of the events giving rise to this litigation, Eximbank and FCIA entered into an agreement under which FCIA can seek reimbursement for commercial risk claims paid. *Nu-Air,* 822 F. 2d at 924 n. 22; Pet. p. 3. Of course, Nu-Air is not a party to that separate agreement, and the agreement did not even come into existence until *after* the pertinent events giving rise to this litigation had already occurred. *Id.* In any event, the reinsurance agreement does not affect the specific rights and relationship between Nu-Air and FCIA. *Id.*

in place that it accepted the Nigerian order. Without coverage, Nu-Air would have declined the order due to the order's large size and Nu-Air's unfamiliarity with Nigerian practices. *Nu-Air,* 822 F. 2d at 989; R1-36-3; R2-43-21.

3. Contrary to FCIA's statement, it was not established and the Eleventh Circuit did not hold that FCIA acted as Eximbank's agent with respect to the specific transaction in issue here. Pet. pp. 5-6. Instead, solely for the purpose of argument, the Court of Appeals assumed the question in FCIA's favor, since FCIA's claimed "agent of an agency" status made no difference in the outcome of the case. *Nu-Air,* 822 F. 2d at 994 n. 22.

4. By stating only that it issued a policy quotation but subsequently rejected Nu-Air's application for an SBCL, Pet. p. 5, FCIA fails to mention the legal validity of Nu-Air's claim for complete coverage for its loss. In this regard, the Eleventh Circuit held there was ample record evidence, including sworn testimony, for a jury to find FCIA and Nu-Air entered into a binding, enforceable oral agreement for *all* of the coverage sought, including both the master policy and the SBCL. *Nu-Air,* 822 F. 2d at 989-94. FCIA's later attempt to reject this binding contract because of economic conditions in Nigeria[4] did not undermine its enforceability. *Id.*

5. Relatedly, FCIA also neglects to mention that under the written termination notice provision of the policy, FCIA's belated attempt to cancel coverage did not deprive Nu-Air of protection for the Nigerian transaction. *Nu-Air,* 822 F. 2d at 992. Further,

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4/ Apparently to make its refusal to honor its agreement with Nu-Air more palatable, FCIA states it attempted to withdraw SBCL coverage due to "a virtual economic collapse in Nigeria at that time," Pet. p. 5. This so-called "collapse" was really only "import restrictions imposed by the Nigerian government." *Nu-Air,* 822 F. 2d at 990.

it is undisputed that FCIA approved and never cancelled the $200,000.00 master policy. *Id.* at 990, n. 7.

6. FCIA also omits from its "Factual Background" the inconsistencies between the reasons it gave for refusing to pay Nu-Air's claim at the time the loss was incurred and the reasons it later gave for purposes of litigation. When Nu-Air made its claim, the only reason FCIA ever articulated in rejecting it was its unconditional denial that coverage had ever been in force. *Nu-Air,* 822 F. 2d at 993. After suit was filed, however, FCIA relied for the first time on the technical policy defenses of untimely notice and tardy payment of premiums. *Id.*

As the Eleventh Circuit recognized, FCIA's after the fact reliance on these technical forfeiture defenses did not insulate it from liability. To the contrary, because it unconditionally denied coverage had ever existed and because it kept for itself the premiums Nu-Air had paid, under general principles of waiver and estoppel, FCIA had no right to to assert the forfeiture defenses at all. *Id.* at 993-94.[5]

B. Opinions Below

Just as FCIA's "Factual Background" by-passed and inaccurately depicted critical facts and issues, so too its "Opinions Below" section blurred and misstated the actual holdings of the district and appellate courts. As before, FCIA has apparently taken this approach in furtherance of its effort to create the appearance of reviewability. Before examining the specific legal reasons why the writ would be denied, it is therefore necessary to first accurately state the precise holdings below.

5/ Moreover, although the parties agreed on a number of facts, contrary to FCIA's contention they did not ever "stipulate" that Nu-Air "had breached" the policy. Pet. p. 6. The only record support given by FCIA for this assertion is the order of the district court, which the Eleventh Circuit reversed on all counts. *See* Pet. p. 6, citing 29a. Indeed, even FCIA conceded in the district court that there was a disputed issue of fact as to the timeliness of the notice of claim and proof of loss. R4-13. Further, FCIA admitted it was not prejudiced by the asserted untimeliness. R5-13.

1. The District Court's Order

Contrary to FCIA's statement, the district court did not hold "that Nu-Air's *conceded violations* of the policy terms barred its recovery." Pet. p. 7 (emphasis supplied). Although the parties stipulated to a number of things, Nu-Air never stipulated or conceded in any way that it had violated the terms of the policy. *See* n. 5, *supra*. Instead, FCIA merely attempted to use the stipulated facts to argue that Nu-Air had breached the policy, and in an unpublished decision that cited no legal authority for any of its conclusions, the district court agreed. *Nu-Air,* 822 F. 2d at 990 n. 9. Nevertheless, nothing in the district court's order, including the portions quoted by FCIA, Pet. p. 7, stated Nu-Air "conceded" violating the policy. *Id.*

2. The Eleventh Circuit's Decision

Attempting to generate conflicts where none exist and inflate this case with an artificial aura of federal importance, FCIA badly overstates the limited reach of Eleventh Circuit's narrow and carefully drawn conclusions of law. So extensive are FCIA's overstatements that they fatally infect all of the arguments it later raises in its petition. They must therefore be corrected at the outset.

a. *Immunity*

FCIA faces an insurmountable obstacle in attempting to erect a conflict among the Circuits based on the Eleventh Circuit's decision that FCIA is not immune from Nu-Air's tort claim, because no federal appellate court has *ever* held FCIA so immune. Consequently, while FCIA is correct in stating that the Court of Appeals decided it "was subject to suit for its alleged negligent misrepresentations to Nu-Air," it is totally incorrect in its further assertion that in doing so, the Eleventh Circuit "specifically declined" to follow other cases recognizing immunity in like circumstances. The Eleventh Circuit did not "specifically decline"

to follow the cases FCIA cited. It simply reviewed those cases and their holdings with approval, showing why they do not apply to the specific facts at hand. *Nu-Air,* 822 F. 2d at 995-996.

Relatedly, FCIA dwells at length on the Eleventh Circuit's supposed conclusion regarding the immunity of Eximbank. Pet. pp. 7-8. A careful reading of the Court of Appeals' decision, however, reveals the Eleventh Circuit reached no conclusion at all on that issue, much less a reviewable one. *Nu-Air,* 822 F. 2d at 996.

In this regard, the record and the Eleventh Circuit's opinion show that Eximbank was not a defendant below and is not a party here. The Court of Appeals' one sentence, qualified suggestion that "there is no reason to think that Eximbank would be immune from suit" is therefore only dictum. *Id.* at 996. Moreover, this remark is preceded by almost two pages of separate and independent reasons why FCIA, who was a defendant and is a party here, is not immune. *Id.* at 995-96. Even if the Eleventh Circuit's comment concerning Eximbank had been erroneous, the *Nu-Air* decision did not rest on that comment. It cannot now afford a basis for review.

b. *"Federal Common Law"*

FCIA's statement of the Eleventh Circuit's holding on the so-called "federal common law" issue is flawed in much the same way as its statement of the Court's immunity holding. Contrary to FCIA's suggestion, Pet. p. 8, the Court of Appeals did not "reject" any of the federal appellate decisions on which FCIA relied. Indeed, as to several cases, it did not even have the opportunity to do so, since those cases[6] are offered here for the

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6/ *Clearfield Trust Company v. United States,* 318 U.S. 363 (1943); *United States v. County of Allegheny,* 322 U.S. 174 (1944); *United States v. Seckinger,* 397 U.S. 203 (1970).

very first time in support of a point FCIA never raised in the Eleventh Circuit. FCIA's remaining cases were, as in the immunity issue, only reviewed and distinguished. They were not "rejected." *Nu-Air,* 822 F. 2d at 994-95.[7]

REASONS FOR DENYING THE WRIT

In its "Reasons for Granting the Writ," FCIA elevates and recyles two relatively minor fall back arguments[8] it unsuccessfully advanced in the Eleventh Circuit. FCIA contends that because it issues insurance on behalf of Eximbank, (1) it is immune from Nu-Air's tort claim, and (2) the generally accepted contract principles of waiver and estoppel do not apply to it.

Review of FCIA's contentions under the specific facts of this case reveals FCIA has vainly tried to force a garden variety insurance claims dispute between private litigants into Rule 17's ill-fitting mold. In its struggle, FCIA relies on flawed factual and legal premises and resorts to inapt analogies to inapplicable authorities and circumstances. The resulting analysis is predictably and markedly strained.

When stripped of distractions, two considerations of paramount importance for certiorari purposes emerge from FCIA's petition. First, there is no basis for reviewing the Eleventh Circuit's decision on conflict grounds, because no federal appellate court has ever held that FCIA is immune from suit in tort, or that ordinary contract principles of waiver and estoppel do not apply to it. Second, FCIA's newly devised but undocumented

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7/ In a footnote, FCIA quarreled with the Third Circuit's decision in *Lovell Mfg. v. Export-Import Bank,* 777 F. 2d 894 (3rd Cir. 1985), a case on all fours and the only other federal appellate decision ever addressing the precise issue involved here. The Third Circuit reached the identical conclusion the Eleventh Circuit reached in *Nu-Air. Nu-Air's* specific reliance on *Lovell* demonstrates consistency and uniformity, not division, in the Circuits' approach to the question. *Nu-Air,* 822 F. 2d at 994-95.

8/ Both of these issues together occupied only a little more than four of the 39 pages of FCIA's Eleventh Circuit brief.

speculations notwithstanding, this case does not present any important questions of federal law this Court should decide. The Petition for Writ of Certiorari should be denied.

I. The Eleventh Circuit's Decision Does Not Conflict With Any Other Federal Appellate Decision Holding FCIA Immune From Suit In Tort.

FCIA seeks review of the Eleventh Circuit's holding that FCIA is not immune from Nu-Air's negligent misrepresentation claim on the ground that Nu-Air's holding conflicts with the Eighth Circuit's decision in *Bushman v. Seiler,* 755 F. 2d 653, 655-56 (8th Cir. 1985), and the Ninth Circuit's decision in *Anderson v. Occidental Life Insurance Company,* 727 F. 2d 855 (9th Cir. 1984). FCIA also asks for review of the Court of Appeals' "premise" that Eximbank is not entitled to sovereign immunity from such suit on the ground that this determination "was wrong." Pet. p. 16. Because no real, direct conflict exists between the Eleventh Circuit's decision and the decisions of the Eighth and Ninth Circuits, and because the Eleventh Circuit's single remark regarding Eximbank is only dictum, there is no basis for granting certiorari to review FCIA's immunity argument.

A. *The Eleventh Circuit's decision does not conflict with the decisions of the Eighth and Ninth Circuits.*

The Eighth Circuit's decision in *Bushman* and the Ninth Circuit's decision in *Anderson* do not conflict with *Nu-Air.* This follows immediately from the fact that they have absolutely nothing to do with the specific issue the Eleventh Circuit decided, namely, whether FCIA is immune from its misrepresentation to its customers regarding the existence of commercial credit export risk coverage. *Nu-Air,* 822 F. 2d at 994-95.

Bushman and *Anderson* are medicare cases. They do not involve federal export insurance, FCIA, or FCIA's relationship with Eximbank. Likewise, they do not involve any policy provision even remotely resembling the one in this case under which

FCIA, not Eximbank or the federal government, was the *sole* insurer of the risk. *Nu-Air,* 822 F.2d at 994, 996. Instead, *Bushman* and *Anderson* are controlled by the distinct and specific body of federal statutes, regulations, and cases governing the medicare program, out of which the rule has evolved that medicare intermediaries and carriers can be governmental agents for immunity purposes. *Bushman,* 755 F. 2d at 655; *Anderson,* 727 at 856.

So different is the medicare setting from the foreign export commercial credit insurance framework that it does not even provide a useful analogy. Unlike FCIA, insurance companies acting as medicare carriers are true fiscal intermediaries, subject to extensive and specific federal regulations. More importantly, the United States is the real party in interest when claims are made against medicare carriers, because recovery would come from the federal treasury. *Bushman,* 755 F.2d at 655; *Anderson,* 727 F.2d at 856.

FCIA, on the other hand, is not even mentioned in Eximbank's enabling statute or in any regulations governing it. Eximbank's own regulations contain no mention of required policy terms. Further, as both Circuits considering the issue have concluded, claims against FCIA under the specific commercial credit provision in issue here are solely against FCIA, a private entity. Unlike the medicare cases, they do not involve the United States or the public fisc. *Nu-Air,* 822 F.2d at 994, 996; *Lovell Mfg. v. Export-Import Bank of U.S.,* 777 F. 2d 894, 899-901 (3rd Cir. 1985).

In sum, no federal appellate decision has ever held FCIA immune from suit in tort based on the grounds FCIA asserts here

or on any other grounds.[9] For this reason, and because the Eighth and Ninth Circuits' medicare decisions are not even remotely related to this specific issue, FCIA's immunity argument presents no conflict within the meaning of Rule 17.[10]

That there is no true and direct conflict between *Nu-Air* and *Bushman* or *Anderson* concludes the matter for certiorari purposes. So seriously flawed is FCIA's analysis of the immunity issue, however, further response is required.

First, FCIA's own inherent characteristics disable it from claiming official immunity under the controlling decisions. Unlike the high level federal government officials, officers, employees, and others in government service in the cases it cites,[11] FCIA is nothing more than an unincorporated association of large, private insurance companies, combined for the specific purpose of making a profit. It is not an agency, officer, or employee of the federal government, and its member companies do not employ federal officers or employees.

The significance of this distinction is that, as the Eleventh Circuit stated, official immunity is extended only where the threat of liability might inhibit the fearless, vigorous, and effective

9/ When challenged in the Eleventh Circuit to produce even one such case, FCIA triumphantly cited the district court decision in *Hamilton Bank v. Export-Import Bank,* 634 F. Supp. 195 (E. D. Pa. 1986), urging that the *Hamilton Bank* court "accepted FCIA's contention that FCIA should be held immune from suit for any tortious conduct on its part." Appellee's Br. at 31. Review of *Hamilton Bank* revealed, however, that FCIA constructed its argument from a small sentence fragment it had wrenched from context. A reading of the entire sentence revealed the district court in *Hamilton Bank* did *not* hold FCIA immune, but instead only identified immunity as an argument FCIA was raising. 634 F. Supp. at 203. FCIA does not cite *Hamilton Bank* in this Court.

10/ To the contrary, *Nu-Air* reviews *Bushman's* rationale with approval, noting that it provides support for the conclusion that there is no basis for extending official immunity to FCIA in the instant case. *Nu-Air,* 822 F.2d at 995.

11/ *See Harlow v. Fitzgerald,* 457 U.S. 800 (1982) (senior aides and advisors of the President of the United States); *Butz v. Economou,* 438 U.S. 478 (1978) (federal executive officials in the Department of Agriculture); *Barr v. Matteo,* 360 U.S. 564 (1959) (director of important government agency).

administration of government policies. *Nu-Air,* 822 F.2d at 995. This concern arises most frequently when the defendant is an individual in public service, but seldom arises where, as here, the defendant's connection with the government is limited to a business relationship. *Id.*, citing *Doe v. McMillan,* 412 U.S. 306 (1973); *Barr v. Matteo,* 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959); *Bushman,* 755 F. 2d at 656.

In other words, as this Court recently reiterated, the protection under official immunity that FCIA seeks in this case is reserved for high level policy decision making by federal officials, where it serves a legitimate government purpose. *Westfall v. Erwin,* 484 U.S. ____, 108 S.Ct. 580, 98 L.Ed. 4087, 4080, 4089 (1988); *Harlow,* 457 U.S. at 807.[12] As the Eleventh Circuit stated, no worthwhile purpose would be served by affording FCIA immunity from liability for misrepresentations it makes to customers in selling and administering commercial credit risk insurance. *Nu-Air,* 822 F.2d at 996. Keeping in mind FCIA's private status, its purely profit oriented objective, and its responsibility as the sole insurer of the specific risk in this case, there is no basis for concluding that the alleged misrepresentations giving rise to this dispute come within the public service and public benefit rationale of *Barr* and its progeny.[13]

Second, just as FCIA is not the sort of federal government official or officer to whom official immunity has been extended,

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12/ Moreover, even if official immunity applied to this case, it is only a qualified immunity which FCIA cannot invoke on these facts because FCIA has not made the requisite threshold showing of good faith in the performance of a discretionary function, and it cannot do so. *Harlow,* 457 U.S. at 815; *Butz,* 438 U.S. at 486.

13/ In addition to *Bushman* and *Anderson,* FCIA relies on two other medicare cases that are distinguishable on the same grounds, *Matranga v. Travelers Insurance Co.,* 563 F. 2d 677 (5th Cir. 1977) and *Peterson v. Weinberger,* 508 F. 2d 45 (5th Cir.), cert. denied, 423 U.S. 830 (1975). These pre-October 1, 1981 decisions of the former Fifth Circuit are binding on the Eleventh Circuit. *Bonner v. City of Prichard,* 661 F. 2d 1206 (11th Cir. 1981) (en banc). In *Nu-Air,* the Court of Appeals specifically approved them, noting that they present "wholly different considerations" from the instant case. *Nu-Air,* 822 F.2d at 996.

so too Nu-Air's tort claim is not the "harassing," "unjustified," "frivolous," or "insubstantial" litigation against which FCIA's immunity cases are intended to protect. *See Davis v. Sherer,* 468 U.S. 183, 195 (1984); *Harlow,* 457 U.S. at 808. To the contrary, the record shows Nu-Air's misrepresentation claim is founded on (1) sworn testimony by an insurance broker that FCIA promised to provide full coverage for the Nigerian transaction; (2) the parties' stipulation that Nu-Air relied on the promised coverage in consummating the Nigerian sale, and would not have gone forward without it; (3) the parties' stipulation that FCIA retained and has never refunded the premiums Nu-Air paid for the coverage; and (4) FCIA's subsequent refusal to cover Nu-Air's loss. Indeed, FCIA has never even suggested Nu-Air's misrepresentation claim was "harassing," "unjustified," "frivolous," or "insubstantial."

Third, FCIA's immunity argument fares no better when it travels under the name "derivative sovereign immunity." Although FCIA attempts to skirt the point by relying on its separate reinsurance agreement with Eximbank, Pet. pp. 3, 11, 16, FCIA cannot derive sovereign immunity because, as noted above, Nu-Air's commercial credit claim went solely to FCIA and did not place the United States financially at risk. *Nu-Air,* 822 F.2d at 994, 996; *Lovell Mfg.,* 777 F.2d at 899-901. As the *Nu-Air* and *Lovell* decisions illustrate, contractual indemnity by the government cannot artificially create sovereign immunity. *Brady v. Roosevelt Steamship Company,* 317 U.S. 575, 583-84 (1943); *Rochester Methodist Hospital v. Travelers Insurance Company,* 728 F. 2d 1006, 1014 (8th Cir. 1984); *Foster v. Day and Zimmermann,* 502 F. 2d 867, 875 (8th Cir. 1974).

Fourth, as the Eleventh Circuit stated, the Supreme Court has repeatedly recognized that immunity is not favored when a government agency enters the commercial sphere. *Franchise Tax Bd. of California v. United States Postal Serv.,* 467 U.S. 512, 104 S.Ct. 2549, 81 L.Ed.2d 446 (1984). Certainly when as in the instant case a private association of large, profit motivated

insurance companies seeks to immunize itself from its torts under the theory that it is but an agent of such an agency, immunity is even less favored. *Keifer & Keifer v. Reconstruction Finance Corporation,* 306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784 (1939).[14]

Finally, the very language of the insurance policy issued in this case undercuts FCIA's immunity claim. Article IX, "Action Against Insurers," specifically contemplates and provides for the institution of actions against FCIA. Article IX does not limit such actions to suits sounding in contract. Since under well-settled principles of insurance law this provision must be construed against FCIA as the party who drafted the contract, it must be assumed that tort suits are authorized as well.

B. *The Eleventh Circuit's decision does not present any reviewable holding regarding the immunity of Eximbank.*

FCIA also contends the Supreme Court should review this case on the ground that the Eleventh Circuit "was wrong in determining that Eximbank does not enjoy sovereign immunity from negligent misrepresentation suits." Pet. p. 16. Since the Eleventh Circuit made no such determination, this argument needs only brief response.

FCIA's contention rests on the Eleventh Circuit's single passing remark that "there is no reason to think that Eximbank *would be* immune from suit." *Nu-Air,* 822 F. 2d at 996 (emphasis

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14/ Of course, even as to other types of coverage in which FCIA is not the direct, sole insurer and its participation is arguably more limited to its involvement as Eximbank's "agent," it does not follow that it would derive immunity through Eximbank. There is no federal appellate authority holding Eximbank immune, and even if there was, such immunity would not automatically encompass FCIA. "The government does not become the conduit of its immunity in suits against its agents or employees merely because they do it to work." *Keifer & Keifer,* 306 U.S. at 388. The mere fact that Congress created Eximbank and authorized the export credit insurance program does not mean that a suit on an insurance policy issued by FCIA necessarily involves a question of federal law. *See Gensplit Finance Corp. v. FCIA,* 616 F. Supp. 1504, 1507 (D.C. Wis. (1985).

supplied). Even if this comment could be construed as an actual holding that Eximbank is not immune, it cannot provide any basis for review on conflict grounds, since no federal appellate court has ever held otherwise.

This Court need not, however, address the question of Eximbank's immunity or the correctness of the Eleventh Circuit's comment. Eximbank is not a party to this litigation. The above quoted passage is, at the very most, dictum. The Eleventh Circuit's actual holding regarding FCIA is supported by almost two pages of independent reasoning. *See Nu-Air,* 822 F.2d at 995-96.

It is understandable that FCIA wants immunity from its torts. Operating in the commercial sphere in competition with other private insurance companies issuing similar policies, the protection of immunity would give FCIA an immense advantage over other companies who would continue to be held accountable for their similar conduct.

But the advantage FCIA seeks is unwarranted and unfair, and this Court has not extended it in these circumstances. *See Franchise Tax Board of California v. United States Postal Serv.,* 467 U.S. 512, 517 (1984). Perhaps even worse, the new rule FCIA urges this Court to adopt is seemingly without limit. Logically extended, it would immunize virtually all private persons, companies, or other entities who ever act on behalf of statutorily authorized agencies of the federal government. This result is inconsistent with the rationale of the controlling Supreme Court and Circuit Court cases, and should not be put in place here.

II. The Eleventh Circuit's Decision Does Not Conflict With Any Other Federal Appellate Decisions Holding General Contract Principles of Waiver and Estoppel Do Not Apply To FCIA.

FCIA also contends that the Eleventh Circuit's decision conflicts with decisions of the First, Fifth, and Ninth Circuits holding federal common law can govern the rights and liabilities of parties to an insurance contract issued under a federal government insurance program even though private insurers actively participate in it. Pet. p. 21, citing the flood insurance decisions in *Brazil v. Giuffrida,* 763 F.2d 1072 (9th Cir. 1985), *United States v. Parish of St. Bernard,* 756 F.2d 1116 (5th Cir. 1985), *cert. denied,* 474 U.S. 1070 (1986), and *Atlas Pallet, Inc. v. Gallagher,* 725 F.2d 131 (1st Cir. 1984).[15] As before, FCIA's conflict argument cannot withstand scrutiny, because it is based on an erroneous and overbroad depiction of the Eleventh Circuit's limited holding on the narrow issue before it.

In this regard, review of the Eleventh Circuit's opinion shows that contrary to FCIA's assertion, the Court did *not* make the sweeping declaration that state rather than federal law governs insurance policies issued pursuant to federal government insurance programs. It did not have to decide that broad issue, because on the facts of this case, it was not presented.

The only issue actually before the Eleventh Circuit, and hence the only issue it decided, was whether FCIA is entitled to avoid the application of general state law contract principles of *waiver* and *estoppel* in issuing *commercial credit risk coverage* on the ground that it issues insurance on behalf of Eximbank. *Nu-Air,* 822 F.2d at 994. On this single, narrow question, the Eleventh Circuit held only "that traditional principles of waiver and estoppel apply." *Nu-Air,* 822 F.2d at 995.

15/ FCIA's list of purported conflict cases also includes *Beverly v. Macy,* 702 F.2d 931 (11th Cir. 1983) and *West v. Harris,* 573 F.2d 873 (5th Cir. 1978), *cert. denied,* 440 U.S. 946 (1979). *Beverly* is, however, an Eleventh Circuit case and cannot serve as the basis for a reviewable conflict. Likewise, *West* is a pre-October 1, 1981 Fifth Circuit decision which the Eleventh Circuit has never rejected. *See Bonner v. City of Prichard, supra.*

This precise issue - FCIA's so-called "federal common law" question - was not before the First, Fifth, or Ninth Circuits in any of the flood insurance cases FCIA cites. As before, FCIA cannot present the square, direct conflict required for conflict review.[16]

FCIA's misplaced reliance on the dissimilar flood insurance scenario does not divert attention from a 1985 Third Circuit decision on all fours that decided the precise issue before the Court even before *Nu-Air*. In *Lovell Manufacturing v. Export-Import Bank of the United States*, 777 F.2d 894 (3d Cir. 1985) the plaintiff insured sued FCIA in a policy dispute arising out of commercial credit risk coverage. Exactly as in this case, under the policy, FCIA was the sole insurer of commercial credit risk and Eximbank was the sole insurer of political risk. *Lovell*, 777 F. 2d at 896. Like the plaintiff here, acting specifically in reliance on the coverage, the *Lovell* plaintiff paid premiums and sold products to a foreign purchaser, who eventually defaulted. *Id.* Again mirroring the instant situation, the district court granted FCIA's motion for summary judgment on the ground that, as an agent of Eximbank, higher standards for establishing estoppel against the government applied. *Lovell*, 777 F.2d at 897.

The Third Circuit conducted an exhaustive review of all of the same grounds for avoiding estoppel that FCIA has reasserted in this case, including the agency and reinsurance agreements between Eximbank and FCIA. Exactly as here, the Court of

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16/ Other significant distinctions between the instant case and FCIA's national flood insurance program cases abound. In contrast to the instant situation, the flood program has its own distinct and extensive statutory and regulatory framework, and flood insurance policy terms are expressly dictated by federal regulations, the implied waiver of which could arguably frustrate specific governmental policies. Moreover, unlike the instant case in which FCIA acts as the sole insurer of the commercial credit risk coverage in issue, under the national flood insurance program, the federal government, not the insurance companies, bears the risk. Significantly, even in the distinctly federal context of flood insurance law, however, FCIA's own cases acknowledge that ordinary, standard insurance law principles apply. *See Brazil*, 763 F.2d at 1075; *West*, 573 F.2d at 881; *Beverly*, 702 F.2d at 937; *Atlas Pallet, Inc.*, 725 F.2d at 135.

Appeals rejected FCIA's contentions and held traditional estoppel principles, not more stringent government standards, apply to FCIA as the sole insurer of commercial credit risks. *Lovell Manufacturing,* 777 F. 2d at 899-901; cited in *Nu-Air,* 822 F.2d at 994-95.

In direct refutation of FCIA's argument that more rigid government estoppel standards should apply because Eximbank (and hence the federal government) are financially at risk under the reinsurance agreements, Pet. pp. ii, 12, 16, the *Lovell* Court stated:

> The reinsurance agreements only run between Eximbank and FCIA. The fact that FCIA must now look to Eximbank for recoupment on Lovell's claim, pursuant to an entirely separate agreement to which Lovell was not a party, does not affect the duties owed to Lovell by FCIA under the insurance policies it issued. The obligation to Lovell resides with FCIA and not with Eximbank. Moreover, it is FCIA's potential claim against the government under the reinsurance agreements, and not Lovell's, which is directed toward public fisc; this is not the case before us.

777 F.2d at 901. The Eleventh Circuit specifically adopted this analysis and conclusion in this case. *Nu-Air,* 822 F.2d at 994-95.

Lovell and *Nu-Air* vividly emphasize a unique feature of the FCIA - Eximbank relationship that at once distinguishes all of FCIA's other authorities, dismantles FCIA's federal common law argument, and undermines its entire petition. Regardless of whether FCIA is or is not Eximbank's subordinate or agent with respect to certain aspects of the issuance of export credit insurance, as to the specific kind of insurance in issue here - commercial credit risk coverage - it has been conclusively decided by both of the federal appellate courts that have considered the issue that FCIA is the independent and sole insurer of the risk.

Nu-Air, 822 F.2d at 994; *Lovell,* 777 F.2d at 901.[17] Because FCIA is a private entity[18] and the public treasury is not at risk from Nu-Air's claim, traditional equitable principles of waiver and estoppel apply. *Id.*

III. The Eleventh Circuit's Decision That FCIA Is Subject To Ordinary Contract Principles Of Waiver And Estoppel And To Suit In Tort Does Not Present Any Important Questions Of Federal Law That Should Be Settled By The Supreme Court.

Although it is difficult to classify FCIA's remaining arguments with precision, their apparent purpose is to attempt to show that the Eleventh Circuit's decision in *Nu-Air* presents important federal questions worthy of this Court's attention and time. Specifically, FCIA complains that (1) Nu-Air is at odds with *Clearfield Trust Company v. United States,* 318 U.S. 363 (1943), and its progeny; (2) in a footnote to its opinion, the Eleventh Circuit wrongly left open the question of the extent to which federal law governs insurance contracts issued on behalf of Eximbank; and most remarkably, (3) the *Nu-Air* decision will cause U.S. companies to reduce their exports abroad. Pet. pp. 4, 8, 9, 16-20. All three arguments suffer from the same two decisive defects. They present no grounds for review, and they are just plain wrong.

A. *FCIA's Clearfield Trust argument is not properly before this Court.*

Apparently equating the instant garden variety insurance

17/ In a footnote, FCIA claims only that *Lovell* was wrongly decided. It does not contest that *Lovell's* critical facts are virtually indistinguishable from the instant case and that its holding is directly opposed to the position FCIA takes here.

18/ When a dispute involves only the rights of private litigants, with no substantial rights or duties of the federal government being directly involved, it is inappropriate to develope federal rules of decision. *Miree v. Dekalb County, Georgia,* 433 U.S. 25 (1977).

policy dispute between two private entities with a "contract through which the United States is exercising its constitutional function," Pet. p. 17, FCIA contends the Eleventh Circuit's decision runs afoul of the goal of uniformity expressed in *Clearfield Trust Company v. United States,* 318 U.S. 363 (1943). FCIA's reliance on *Clearfield Trust,* however, comes too late. Since FCIA never presented its national uniformity argument at any time in the Court of Appeals, it cannot now urge that it provides a basis for review by the Supreme Court. *Delta Air Lines v. August,* 450 U.S. 346, 362 (1981). Indeed, before filing its petition for certiorari, FCIA had never even cited *Clearfield Trust* or the other two cases it presents in the context of its *Clearfield Trust* argument, *United States v. County of Allegheny,* 322 U.S. 174 (1944) and *United States v. Seckinger,* 397 U.S. 203 (1970).

Evidently in tacit recognition of this jurisdictional dilemma, FCIA's petition carefully refrains from claiming *Clearfield Trust* conflicts with the Eleventh Circuit's decision in *Nu-Air.* Obviously, no such conflict argument is possible, since the Court of Appeals did not mention and never even had the opportunity to consider FCIA's *Clearfield Trust* argument. Given FCIA's reliance on the medicare and flood cases, its readiness to use remote and badly strained analogies has already been demonstrated. It can therefore reasonably be assumed that if FCIA had thought *Clearfield Trust* properly before this Court, it would have based a conflict argument on it as well, even though that case involves federal commercial paper, not insurance.

FCIA's reliance on *Clearfield Trust* is telling for the additional reason that it signals FCIA's virtual abandonment of the main argument it used below in support of its federal common law theory. In the Eleventh Circuit, FCIA's attempt to escape the application of general contract principles of waiver and estoppel rested on *Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380 (1947). FCIA urged under that decision that strict technical compliance with all policy terms was compelled because Nu-Air's policy was "issued pursuant to a federal government insurance program." Appellee Br. at 28.

In *Nu-Air,* the Eleventh Circuit considered *Federal Crop Insurance Corp. v. Merrill* carefully and at length. *Nu-Air,* 822 F.2d at 994. Having done so, it reached the identical conclusion that the Third Circuit had reached in *Lovell* - that "traditional equitable principles of waiver and estoppel apply." *Id.* at 995. That FCIA has now relegated *Federal Crop Insurance Corp. v. Merrill* to a single mention in a footnote evidences its unspoken concession that it cannot effectively challenge the Court of Appeals' thorough analysis.

B. *The Eleventh Circuit's decision is not inconsistent with Clearfield Trust.*

Even if *Clearfield Trust* and its progeny were now properly before this Court, the result in this case would be unaffected. The fear that FCIA now expresses for the first time - that *Nu-Air* will subject all federal government insurance programs to "the vagaries" of "over 50 set of rules, procedures, statutes and regulations" - is not rooted in reality. The Eleventh Circuit's decision does not impact on all federal government insurance programs. Indeed, it does not even impact on all foreign credit export insurance or insurers. Instead, it applies strictly to FCIA, a private association of large insurance companies, and even then only to FCIA's contractual liability under the commercial credit risk provision of its export credit policies. In fact, FCIA not only concedes the limited reach of the Eleventh Circuit's opinion, it even complains about it.[19]

FCIA's new found anxiety is further deflated by the reality that the application of state rules of estoppel and waiver to the specific type of coverage in issue here will yield few, if any, different results. The majority of the Circuits do recognize estoppel even against the government. *United States v. Asmar,* 827 F.2d 907, 911 (3rd Cr. 1987). As FCIA's own authorities

19/ Although Eximbank is not a party to this case, FCIA complains that the Eleventh Circuit has left open the question of the extent to which federal common law governs insurance contracts issued on Eximbank's behalf. Pet. p. 18.

recognize, even in the context of the federal flood insurance program, federal courts apply standard, general principles of insurance law. There is nothing to indicate that the ordinary, traditional estoppel and waiver principles applied here are not such standard, general principles.

Relatedly, although FCIA gravely warns of "the vagaries" of over "50 sets of rules," it does not cite even a single case showing the instant result would be different under another state's estoppel and waiver rules. For that matter, FCIA has not cited and cannot cite even one federal appellate decision declining to apply ordinary estoppel and waiver rules where, as here, a private insurer participating in a federal insurance program is the sole insurer of the specific risk under consideration. *See, Nu-Air,* 822 F. 2d at 994; *Lovell,* 777 F.2d at 901. FCIA's assertion of "vagaries" and "over 50 sets of rules" notwithstanding, at least with respect to the single issue presented here, it is the ordinary, general state law rules that are settled and consistent, and the so-called federal common law that is unknown and vague.[20]

Of course, as a practical matter, FCIA's entire discussion is only conjecture and speculation. At this juncture, it cannot be conclusively said that on remand it will even be necessary for Nu-Air to resort to waiver and estoppel principles. Nu-Air has never conceded breaching the policy, and as there is no binding ruling in this case that it has. The district court opinion concluding Nu-Air violated the policy terms was reversed on all counts. The Eleventh Circuit's decision merely noted FCIA's policy defense arguments, but never held them meritorious. *Nu-Air,* 822 F.2d at 993; *see* n. 5, *supra.*

Finally, FCIA's own behavior refutes its *Clearfield Trust* argument. FCIA laments that *Nu-Air's* estoppel and waiver holding makes the world of commercial credit export insurance too vague, uncertain and unpredictable for it to conduct business.

20/ Of course, if as FCIA's cases suggest the same result will be reached whether federal or state law is applied, no ground for review is presented. *See Sommerville v. United States,* 376 U.S. 909 (1964).

If FCIA's argument had any validity at all, its member companies would have disbanded the association, or at least restructured FCIA's contract with Eximbank when the Third Circuit reached the identical conclusion three years ago in *Lovell.* FCIA is still writing commercial credit risk coverage, and contrary to its suggestion, the federal government's export credit insurance program has not screeched to grinding halt.

Relatedly, FCIA cannot reasonably argue that it will face an insurmountable task in determining the applicable state law when it issues commercial credit export coverage. Even assuming that there are states following rules of waiver and estoppel differing from Florida's, it will not be a burdensome or even an unusual task for Aetna, Continental, Fireman's Fund, Liberty Mutual and FCIA's other member companies to find the controlling rules. These large insurance companies do business, issue policies, and engage in litigation across the country every day. Determining the specific law in a particular locality is neither difficult nor new to them.

C. *The Eleventh Circuit's decision does not present any reviewable holding regarding application of the federal common law to Eximbank.*

FCIA stages a strawman attack on the footnote in *Nu-Air* that specifically leaves open the question of the extent to which federal law governs insurance contracts issued on behalf of Eximbank. *Nu-Air,* 822 F.2d at 995 n.24. Essentially, FCIA makes the broad argument that in refraining from deciding the question, the Eleventh Circuit's decision will plunge the totality of the law governing export credit insurance into uncertainty. Pet. pp. 18-20. Such histrionics cannot withstand even superficial scrutiny.

First, although the point is almost lost in FCIA's petition, Eximbank is not a party to this litigation. Accordingly, that the Eleventh Circuit's *Nu-Air* opinion refrains from reaching any legal conclusions specifically regarding Eximbank is only proper. The footnote that is the target of FCIA's attack merely clarifies that

the Eleventh Circuit has fulfilled its duty of deciding only the specific case and controversy before it.

Second, FCIA stands on its head the reality of the situation with its suggestion that in leaving open the question of the applicability of the federal common law to Eximbank, the Eleventh Circuit has "artificially divided" export credit risk into political and commercial coverage. Pet. p. 18. It was FCIA and Eximbank, *not* the Court of Appeals, who decided to divide export credit coverage into political and commercial components and who decided that FCIA would be the sole insurer of the latter. Presumably in making this distinction FCIA and Eximbank did not intend it to be legally meaningless. Having specifically agreed to this unique division of responsibilities and risks, FCIA's present expressions of shock, alarm, and fear that it will be impaired in performing its function because it cannot discern the legal standards applicable to it, Pet. pp. 12, 19, 20, cannot be taken seriously.

In other words, even if as FCIA asserts this separation of risks is "artificial," "absurd," "untenable," "inconceivable," and "makes no sense," Pet. p. 18-20, FCIA cannot be heard to complain. It agreed with FCIA to apportion the risks in this fashion, and at least since *Lovell* was decided in 1985, both entities have been well aware of the legal consequences of doing so.

In the final analysis, FCIA's petition protests too much. Bloated by gross misstatements of the Eleventh Circuit's holdings, far fetched analogies to clearly distinguishable cases and circumstances, and reliance on issues that are not even before his Court, FCIA's strained arguments collapse under their own weight.

D. *The Eleventh Circuit's decision will neither undermine federal insurance programs nor reduce exports by U.S. Companies.*

Apparently in furtherance of its effort to give the Eleventh Circuit's *Nu-Air* decision the appearance of having the broad

federal importance that it lacks, FCIA's petition is riddled with unsupported speculations and colorations. For example, attempting to emphasize its contention that it was a mere "agent" of Eximbank, FCIA states without citing any authority that "federal government control of the export credit insurance program is complete." Pet. p. 3. Yet FCIA is not mentioned in any relevant federal statutes or regulations, and as to the commercial credit coverage in issue here, it is well settled that FCIA is the sole insurer. Similarly, relying on argument by negative implication, FCIA boldly declares that "there is not a shred of evidence" that in establishing the foreign credit export insurance program, "Congress was doing anything less than defining paramount interests." Pet. p. 20. Even if this sweeping generalization had any relevance to the specific facts of this case, there "not a shred of evidence" that in setting up Eximbank, Congress intended to immunize an unmentioned private entity such as FCIA from its torts, or place it above general principles of waiver and estoppel.

Distractions aside, this case involves nothing more than the Eleventh Circuit's carefully considered reversal of the district court's erroneous granting of a summary judgment. The real impact of this holding is confined to the instant private parties' rights and responsibilities with respect to a very specific type of insurance protection, commercial credit risk coverage. As to those rights and responsibilities, the Eleventh and Third Circuits are in complete agreement, and no other federal appellate court has ever ruled differently.

Because it relies so heavily on hyperbole and misstated premises, FCIA is inevitably tripped by its own excesses. This is perhaps best illustrated in FCIA's extraordinary assertion that if not reversed, the Eleventh Circuit's decision will ultimately reduce foreign exports by American companies. Pet. pp. 4, 9-12, 16.

Like FCIA's *Clearfield Trust* contention, this argument was never made in the Eleventh Circuit and is without record support.

Further, it is utterly illogical. It cannot reasonably be believed that a company like Nu-Air, or any company for that matter, will be motivated to increase production and exports if, as FCIA asks this Court to hold, its commercial credit export insurer can wrongly refuse to pay a covered loss, retain the premiums that were paid in good faith, and be shielded from suit in tort and contract. Instead, to the extent that reasonable speculation on the point is possible, it must be assumed that under the result FCIA desires, exports would decline because U.S. companies will fear that they will lack legal recourse against their insurer when policy claims are wrongly denied.

The district court's order cited no legal authority of any kind to support its conclusions, *Nu-Air,* 822 F.2d at 990 n. 9, and the Eleventh Circuit's thorough, well-reasoned and comprehensive opinion in *Nu-Air* was correct in reversing it. For the reasons articulated in the Court of Appeals' decision and in this response, FCIA's petition for certiorari presents no grounds for review. It should be denied.

CONCLUSION

For the foregoing reasons, FCIA's petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

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No. 87-1070

IN THE

Supreme Court of the United States

October Term, 1987

FOREIGN CREDIT INSURANCE ASSOCIATION,
Petitioner,

v.

NU-AIR MANUFACTURING COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. The Court of Appeals' Decision Conflicts With Other Circuit Court Decisions And Raises Important Concerns Regarding The Administration of Federal Programs	2
II. This Petition Presents The Important Question Whether Formation Of A Contract With A Federal Agency Is Governed By Federal Or State Law	4
CONCLUSION	6

TABLE OF AUTHORITIES

	PAGE
Anderson v. *Occidental Life Ins. Co.*, 727 F.2d 855 (9th Cir. 1984) *(per curiam)*	2,3
Beverly v. *Macy*, 702 F.2d 931 (11th Cir. 1983)	4,5
Brazil v. *Giuffrida*, 763 F.2d 1072 (9th Cir. 1985)	4,5
Bushman v. *Seiler*, 755 F.2d 653 (8th Cir. 1985)	2,3
Clearfield Trust Co. v. *United States*, 318 U.S. 363 (1943)	4
Lovell Mfg. v. *Export-Import Bank*, 777 F.2d 894 (3d Cir. 1985)	5
United States v. *Parish of St. Bernard*, 756 F.2d 1116 (5th Cir. 1985), *cert. denied*, 474 U.S. 1070 (1986)	5
West v. *Harris*, 573 F.2d 873 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979)	4
Westfall v. *Erwin*, 484 U.S. , 108 S. Ct. 580 (1988)	2

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Respondent Nu-Air Manufacturing Company's ("Nu-Air") Brief in Opposition to the Petition for a Writ of Certiorari focuses on issues which were not material to the lower court's decision. Nu-Air addresses first the Eleventh Circuit's departure from a uniform body of law holding that authorized agents of the Federal Government are immune from common law tort claims. Nu-Air reasons that because its claims were filed with the Foreign Credit Insurance Association ("FCIA") under the commercial risk provisions of its policy (as to which FCIA was the nominal insurer), FCIA did not act as the agent of the Export-Import Bank of the United States ("Eximbank"), a Federal Government agency and the political risk insurer under the policy. The court of appeals, however, accepted the parties' stipulation and the district court's determination that FCIA acted at all material times in its capacity as Eximbank's agent in connection with the issuance of Nu-Air's policy. The court of appeals rejected FCIA's entitlement to immunity based solely on its view that neither the Federal Government nor its agents are entitled to

immunity when they engage in conduct that may have a commercial dimension, notwithstanding an express congressional mandate to establish and administer a federal insurance program in furtherance of important national policies. In this respect, the court of appeals' decision is in conflict with decisions in the Eighth and Ninth Circuits,[1] a fact which Nu-Air's Opposition does not address.

Addressing itself next to the issue whether state, rather than federal, law applies to this case, Nu-Air asserts that the insurance contract in this case does not implicate federal concerns, and state law therefore should apply, because Nu-Air's claim was directed to the policy's commercial risk insurer, FCIA, and not to Eximbank. However, the issue presented by the instant petition is whether the *formation* of an insurance contract to which the Federal Government is indisputably a party should be governed by state, rather than federal, law. By focusing on the law governing its claims, Nu-Air presupposes the formation of the contract when, in fact, formation itself is the relevant issue.[2]

ARGUMENT

I. The Court of Appeals' Decision Conflicts With Other Circuit Court Decisions And Raises Important Concerns Regarding The Administration of Federal Programs

In the Petition for Certiorari, FCIA demonstrated that the court of appeals' decision denying FCIA immunity directly contradicts the decisions of various courts of appeals which have held that authorized agents of the Federal Government, including corporate entities compensated by the Federal Government, are

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1. *See Bushman* v. *Seiler*, 755 F.2d 653 (8th Cir. 1985); *Anderson* v. *Occidental Life Ins. Co.*, 727 F.2d 855 (9th Cir. 1984) *(per curiam)*.

2. The recent decision in *Westfall* v. *Erwin*, 484 U.S. , 108 S.Ct. 580 (1988), has no bearing on this Petition, as FCIA's entitlement to immunity has never been challenged on the basis that FCIA's conduct was not discretionary in nature.

immune from all common-law tort suits (including suits sounding, as here, in negligent misrepresentation).[3] Nu-Air purports to distinguish those cases on the basis that FCIA's involvement in the Federal Government's export credit insurance program is in part for FCIA's own account. The court of appeals, however, did not rely on any such distinction.[4] The court of appeals instead artificially divided government enterprises that have a commercial dimension, like insurance programs, from other government enterprises. It further distinguished between those torts, like negligent misrepresentation, which may arise in a federal insurance program, and torts like defamation. Petition for Certiorari at 14a. No other court has ever drawn the distinctions adopted by the court of appeals, although the opportunities have been frequent. *See* Petition for Certiorari at 13-15.

Congress has authorized Eximbank to encourage American exports through the establishment of a federally administered export-credit insurance program. 12 U.S.C. § 635(a)(1). Congress further authorized Eximbank to administer that program, and has authorized other Federal Government agencies to administer similar programs, with the assistance of private insurers acting as the Federal Government's agents and intermediaries. 12 U.S.C. § 635(c)(2); Petition for Certiorari at 8 n.9. In one judicial stroke, the court of appeals in this case

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3. *See* Petition for Certiorari at 13-15 (citing cases in which courts have held (1) that private insurers and other contractors acting on behalf of the Federal Government are immune from suits sounding in non-constitutional torts, and (2) that immunity protection extends to the tort of negligent misrepresentation).

4. As the Eighth Circuit observed in *Bushman* v. *Seiler, supra,* the immunity issue requires a resolution of two questions: (1) whether the defendant was an agent of the government, and (2) whether the agent is entitled to immunity in the circumstances of the case. 755 F.2d at 655. Nu-Air, in its Opposition, contests FCIA's agency status. *See, e.g.,* Opposition at 9 (distinguishing other federal insurance cases on the basis, *inter alia,* of FCIA's relationship with Eximbank). The court of appeals, however, accepted FCIA's agency status, but held that FCIA was not entitled to immunity as an agent in a Federal Government insurance program, because its activity included a commercial dimension. Petition for Certiorari at 11a n.22.

has imposed a high price—unrestricted tort liability—on Congress' chosen vehicle for implementing such programs. The consequences of the court of appeals' sweeping declaration for the Federal Government's insurance programs warrant review of the court of appeals' judgment by this Court.

II. This Petition Presents The Important Question Whether Formation Of A Contract With A Federal Agency Is Governed By Federal Or State Law

The Petition presents the important quetion whether the formation of a contract between Nu-Air, FCIA and Eximbank should be governed by federal common law because a Federal Government agency, Eximbank, was a full party to the contract.[5] Nu-Air's Opposition treats an entirely different issue—the law which should govern a claim directed at FCIA after an insurance contract has already been formed.

The contract formation issue raised in this lawsuit is of critical import to the administration of the numerous federal·programs which involve contractual relationships among private and public entities. Eximbank and FCIA must know of the circumstances under which they obligate themselves to an insurance applicant. Similarly, the applicants for Eximbank and FCIA insurance, and other similar Federal Government-sponsored insurance, must be able to evaluate whether they have successfully secured insurance or must seek to protect their interests by some other means. Identically situated policyholders should be subject to uniform treatment under a Federal Government program. For these reasons, every court of appeals to consider the issue has concluded that federal common law, rather than the disparate laws of more than fifty jurisdictions, should apply to the determination of whether the parties to a federal insurance contract in fact have

5. *See*, e.g., *Beverly* v. *Macy*, 702 F.2d 931 (11th Cir. 1983); *Brazil* v. *Giuffrida*, 763 F.2d 1072 (9th Cir. 1985); *West* v. *Harris*, 573 F.2d 873 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979). *See also*, Petition for Certiorari at 20-22. These cases, which were cited in FCIA's brief to the court of appeals, are the progeny of this Court's decision in *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943), thus preserving FCIA's right to petition for a writ of certiorari on this issue.

formed such a contract.[6] Nu-Air's effort to distinguish these cases based on whether a claim filed by the insured is one covered by the policy's commercial risk coverage, rather than political risk coverage, is misplaced.[7]

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6. *See Brazil* v. *Giuffrida*, 763 F.2d 1072, 1075-76 (9th Cir. 1985) (federal law governs renewal of a federal insurance policy); *Beverly* v. *Macy*, 702 F.2d 931 (11th Cir. 1983) (federal law governs the determination of a party's rights under a purely private contract issued in connection with a federal insurance program, as federal rights were affected); *United States* v. *Parish of St. Bernard*, 756 F.2d 1116, 1121 (5th Cir. 1985), *cert. denied*, 474 U.S. 1070 (1986) (federal common law governs formation of a contract under a federal insurance program).

7. Nu-Air places great reliance on the Third Circuit's decision in *Lovell Mfg.* v. *Export-Import Bank*, 777 F.2d 894 (3d Cir. 1985). The Third Circuit in *Lovell* concerned itself with the issue of the parties' purported waiver of a condition subsequent to coverage under the policy; the Third Circuit in *Lovell* was not concerned with the issue whether the parties had consummated a contract which bound FCIA and Eximbank.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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